

CV-18-02778-PHX-JJT, June 12, 2019

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Puente, an Arizona nonprofit)
corporation, et al.,)
Plaintiffs,)
vs.) CV-18-02778-PHX-JJT
City of Phoenix, a municipal)
corporation, et al.,)
Defendants.) Phoenix, Arizona
June 12, 2019
1:44 p.m.

BEFORE: THE HONORABLE JOHN J. TUCHI, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENT

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P R O C E E D I N G S

(Court was called to order by the courtroom deputy.)

(Proceedings begin at 1:44.)

COURTROOM DEPUTY: This is civil case 18-2778,
Puente, et al. v. City of Phoenix, et al.

01:44:42

This is the time set for oral argument.

Counsel, please announce.

MS. BRODY: Good afternoon, Your Honor. Kathy Brody
from the ACLU of Arizona on behalf of plaintiffs. Here with me
today are my co-counsel, Barry Litt and Josh Piovia-Scott. In
addition, our client plaintiff Janet Travis is in the courtroom
today.

01:44:54

THE COURT: Very good. All welcome. Ms. Brody, Mr.
Litt, Mr. Piovia-Scott, all, welcome.

MR. ROSENBAUM: Good afternoon, Your Honor. David
Rosenbaum, Mary O'Grady, and Josh Whitaker from the Osborn
Maledon firm. And Nishan Wilde from our co-counsel, Manning &
Kass, representing the defendants.

01:45:05

We, too, have one of our clients in the courtroom,
Lieutenant Ben Moore, the Field Force Commander, is here this
afternoon.

01:45:21

THE COURT: All right, sir. Good afternoon
Mr. Rosenbaum, Ms. O'Grady, Mr. Whitaker, and Mr. Wilde and
all, welcome.

We're here today for Court to hear oral argument on

01:45:33

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1 the plaintiffs' motion for certification of classes. The Court
2 has absorbed all of the material that has been filed, written
3 as well as the video. Both myself and several members of
4 chambers staff have watched every minute and read everything in
5 preparation for today, and I will have a good number of
6 questions for you which I'll try to hold until the end of your
7 presentations.

01:45:39

01:45:58

8 As a preliminary matter, let me just remind everyone
9 here that pursuant to Local Rule of Civil Procedure 43.1, there
10 is no recording, electronic recording or otherwise, of matters
11 while in the courtroom so please be aware of that. And all
12 cell phones have to be turned off so that they don't cause any
13 kind of a distraction.

01:46:12

14 Ms. Brody, will you be arguing for plaintiffs today?

15 MS. BRODY: Mr. Litt will be arguing.

01:46:31

16 THE COURT: All right. Then if you would like to
17 proceed.

18 MR. LITT: Thank you, Your Honor. Before I begin, I
19 know that you said you had questions that you would hold. But
20 are there particular areas that you would like me to
21 particularly discuss initially or not?

01:46:52

22 THE COURT: No. I'll try not to interrupt you too
23 much. If something is just too tempting for either counsel
24 that's arguing, I'll jump in then but I'll make sure that I get
25 them addressed before we're done.

01:47:09

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1 MR. LITT: Okay.

01:47:11

2 So let me start with what, from our perspective, are
3 the key factual issues because they inform the class
4 certification analysis, because part of what's happened here is
5 the defendants fundamentally approach the facts from a
6 different perspective than we do.

01:47:24

7 And what I mean by that is that defendants, it looks
8 to me, like sort of worked backwards. They say, well, all of
9 these people were doing things and we used force.

10 Our analysis and the class certification is based on
11 some key initial events. So the first key initial event, which
12 is a common issue for the class, is when the PepperBalls® were
13 sprayed on the basis that some people were shaking the fence,
14 was that a lawful use of force? Did there have to be before
15 you were going to use force against the crowd, did you have to
16 inform the crowd in a meaningful and audible way that this was
17 now an unlawful assembly?

01:47:41

01:48:10

18 The timeline is that, basically, at 8:07 in the
19 evening, some police officers saw some people from Antifa
20 shoving other protesters which -- and I should note that coming
21 into the demonstration, the police were fully aware and
22 supposedly prepared and knowledgeable about Antifa tactics and
23 the potential presence of Antifa.

01:48:34

24 Antifa arrives at the fence at 8:20 and the shaking
25 of the fence, which the defendants call a breach, but when you

01:49:02

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1 look at the videos, there's actually not a breach. People were 01:49:06
2 shaking the fence. Nobody crossed the fence. Nobody broke
3 through the fence. Nobody jumped over the fence. There were a
4 handful of people who shook the fence.

5 At that point force was undifferentiated force 01:49:23
6 because by definition, using PepperBalls®, which were aimed at
7 the ground in the general area, could not be restricted to what
8 the defendants agree is, at most, 10 to 20 disrupters out of a
9 crowd of, again, defendants' estimate, 6,000.

10 So whether or not that initial use of force was 01:49:49
11 lawful and appropriate, whether or not means were available
12 which both sides' experts agree is the appropriate tactic of
13 isolating and removing the troublemakers, all of those are
14 common issues as well as the fact that they then followed up
15 with tear gas. Their rationale is, well, a handful of people 01:50:19
16 threw something. Again, we think it's a common issue of
17 whether or not the tear gas was justified based on what had
18 happened, especially because whatever reaction the crowd had
19 was to the fact that basically they were shot at and people
20 didn't know what was happening because the actions of the 01:50:40
21 defendants created mass confusion.

22 And as soon as you have that, you get semi-panic.
23 People don't know what to do, people are at cross-purposes all
24 because there's a failure on the part of law enforcement to
25 follow the appropriate procedures. 01:50:59

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1 The lawful assembly decision is not made until
2 somewhere, the estimate is by the defendants, between 8:42 and
3 8:47 which is now 10 to 15 minutes after they've used
4 undifferentiated force against the crowd and even though the
5 decision is made then, it's not until 8:52 that the first
6 unlawful assembly announcement is made. And that unlawful
7 assembly announcement, there are numerous common issues about
8 whether even at that point the unlawful assembly announcement,
9 if you take it on its own terms, forget everything that
10 happened before and you have say, okay, you're going to
11 announce an unlawful assembly, whether or not it was
12 sufficiently audible. It's very clear that in order to have a
13 lawful -- unlawful assembly order, you've got to inform people
14 that it's unlawful assembly and that it has to be something
15 that can be heard by the crowd.

01:51:05

01:51:24

01:51:47

01:52:03

16 And the second component is that you have to tell
17 people what to do. Saying this is an unlawful assembly in a
18 crowd of 6,000 without even having police to direct people
19 which in demonstrations where it does happen is common. I
20 mean, I've handled several protest cases and this is the first
21 one I can remember where there wasn't anything like that as
22 well as a way to actually get out of the crowd.

01:52:26

23 So from our perspective, this is the key for the
24 class certification analysis of the common issues. There may
25 be questions of later in the evening individualized force. But

01:52:51

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1 that's not the gravamen of our claim at all. The gravamen of
2 our claim is that half-hour period and the way that the police
3 conducted themselves and whether that was justified. And all
4 of those, because for our purposes, the question here is not
5 are we right or are the defendants right? The question here
6 is, are these common issues that can be answered based on
7 generalized proof?

01:52:57

01:53:16

8 And from that perspective, I don't think any of those
9 initial activities are not subject to common proof and a common
10 answer to common questions, which is what the Supreme Court has
11 said is the critical inquiry for purposes of class
12 certification.

01:53:33

13 THE COURT: I understand your point, Mr. Litt, and I
14 do think I understand how essentially it is necessary to cabin
15 the question that is before the Court today. I don't think
16 that there's a dispute either that to some extent the merits of
17 the case creep in on some of these things when the Court has to
18 look essentially behind the allegations.

01:53:47

19 But we're not here to decide the merits. We're here
20 to decide whether or not commonality and the other Rule 23
21 requirements are met.

01:54:07

22 Before we move on, I have a couple of questions about
23 what I shorthand in all of my notes as the dispersal order.
24 Your terminology is the unlawful assembly declaration that came
25 sometime after the first deployments.

01:54:25

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1 You indicate in the motion itself on page 26 or refer 01:54:31
2 to it as an unlawful dispersal order. I want to make sure I
3 understand that because I didn't read anywhere in the complaint
4 that the allegation was that it was unlawful. It was --
5 according to the complaint, it was late and that it was after 01:54:44
6 the initial dispersals of PepperBalls® and other things and
7 that it was inadequate in that it was not heard by or
8 sufficient to be heard. But did you mean something beyond the
9 inadequacy and the process there when you refer to it in your
10 motion as unlawful, the order being unlawful? 01:55:07

11 MR. LITT: In part, yes, because, in effect, what
12 they are doing is, without an announcement, they are dispersing
13 the crowd once they shoot undifferentiated PepperBalls® into
14 the crowd. So it's not a verbal order. But they've argued
15 that sort of their actions communicated that, you know, they 01:55:33
16 were making an unlawful assembly determination.

17 So our point is that it was unlawful for them to do
18 that. We don't need to answer the -- and I do think that it
19 was unlawful at that point when they had made no attempt to
20 isolate people. When you look at the videos, there are police 01:56:00
21 within a few feet. Nobody walks up to the fence and says,
22 "Stop shaking the fence." Nobody goes into the crowd. There
23 are no plain clothes police officers in the crowd which is a
24 standard technique, especially if you're expecting trouble. So
25 we think that it would have been illegal to at that point 01:56:19

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1 announce an unlawful assembly order even at that stage. But,
2 in fact, that's not what happened. But we think it all relates
3 back because the order that comes, what the defendants want to
4 do is say, well, the order that came, by that time, all of
5 these events had happened. We dispute that all of these events
6 had happened but in any event, you can't look at it that way.

01:56:25

01:56:46

7 The police initiated activity that, by definition,
8 was inevitably going to cause chaos among the crowd and then
9 that becomes a post hoc justification for an unlawful assembly
10 order.

01:57:10

11 So our view is that the means of communicating and
12 those other things, but the unlawful assembly order that was
13 announced can't be analyzed separately from the events
14 undertaken by the Phoenix Police Department preceding that
15 that, in our view, were -- did not provide the basis for an
16 unlawful assembly determination.

01:57:26

17 THE COURT: My related question with regard to the
18 unlawful assembly order, is it the plaintiffs' position that an
19 unlawful assembly order must precede any use of the
20 PepperBalls® or other?

01:57:44

21 MR. LITT: It is our position that under the
22 circumstances here -- I don't want to make a generalized
23 statement that in all circumstances that would be true. In the
24 circumstances here whereby the description of the defendants,
25 there were a handful of people in an isolated physical area.

01:58:02

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1 They knew what that physical area was. They had hundreds, I
2 think the number is 900 or more police officers on the scene
3 and we do not think that they could use the PepperBalls®
4 without at least having first tried to extrapolate or extract
5 the troublemakers from the crowd.

01:58:07

01:58:28

6 Because if you use those PepperBalls®, you are using
7 force, by definition. When you look at the videos, hundreds of
8 people, like, physically moved in reaction to the PepperBalls®.
9 The PepperBalls® cannot target an individual or a handful of
10 individuals. That's not how they work. They spread out. They
11 affect all sorts of people who, by the Phoenix Police
12 Department's description, were peaceful protesters, were not
13 doing anything wrong.

01:58:51

14 So our view is you could not use the PepperBalls® at
15 that stage. I'm not saying that you could never use it. We
16 quoted at some length the *Jones v. Parmley* case to the Court
17 written by then Judge, now Justice Sotomayor, and that case
18 talks at length about the fact that you can't -- the fact that
19 there are a handful of disrupters is not a basis to take action
20 against the whole crowd, whether it be force or dispersing the
21 crowd. You've got to have more.

01:59:08

01:59:34

22 Now, maybe that more would have been that they tried
23 and they weren't able to do it but they didn't try.

24 THE COURT: All right, sir. I follow you, Mr. Litt.
25 To try and avoid straight to pure merits, you've answered my

01:59:50

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1 question which was as I read the briefing, it suggested to my 01:59:55
2 that plaintiffs' position was that no dispersal of any of these
3 chemical agents or other would be proper until the warning had
4 been given or the order to disperse had been given. That's not
5 your position. It's circumstantial and your argument is that 02:00:11
6 under the circumstances, that initial use was not justified.
7 That's what I needed to clarify for today on that point.

8 Please go ahead.

9 MR. LITT: All right. So the defendants challenged
10 basically as a failsafe class definition the class definition. 02:00:35
11 I don't know to what extent that's a concern for the Court so
12 I'll just make a few points. One, the Ninth Circuit -- a
13 failsafe class definition is a class definition that
14 presupposes that you won the case and they challenge our
15 component of the class definition that says did not use -- did 02:01:02
16 not engage in activity justifying the use of force.

17 So the first point I want to make is by the
18 definition of a failsafe class, that is not a failsafe class
19 definition. That does not presuppose that we win the issue.
20 All it says is that individual, those class members did not 02:01:24
21 engage in it. Doesn't answer or presuppose the answer to all
22 of the questions we were just discussing. Was the initial
23 force justified? Were the First Amendment rights violated?
24 Did they have to try to extract people from the crowd, et
25 cetera, that we just discussed. So it does not meet the 02:01:43

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1 definition of a failsafe class. And even if it did, the *Melgar* 02:01:47
2 case, which we cited to the Court, makes fairly clear -- I
3 wouldn't say it's 100 percent clear because it says "it
4 appears" -- that the Ninth Circuit's view -- and the Fifth
5 Circuit is explicit -- that there's nothing wrong with a 02:02:08
6 failsafe class. So that the notion that even if you had a
7 failsafe class that would defeat class certification is
8 rejected by the Ninth Circuit.

9 And lastly, as we cited and I think it was the
10 *McMaster* case from the Seventh Circuit and other courts, 02:02:27
11 when -- if do you have a failsafe class and you think that's a
12 problem, the Court has the authority and the responsibility to
13 refine the class definition at any point.

14 So we propose some ways to address that if the Court
15 thought that was an issue. We don't think it is. And the 02:02:48
16 *MIWON* case that we cited, we took that class definition from
17 that case. So on multiple grounds we don't think that really
18 should be a concern for the Court.

19 So then the defendants also raised some issues about
20 the adequacy of our class representatives. 02:03:22

21 Before I go there, are there any questions the Court
22 wants to ask about the definition or failsafe class.

23 THE COURT: Not about the failsafe. I do have a
24 couple of questions at least about the class definition as
25 proposed. 02:03:47

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1 MR. LITT: Okay. So I want to spend a minute on the 02:03:48
2 adequacy. The defendants seem to talk about it as typicality
3 but I think it's really an adequacy analysis. I don't think --
4 given how we framed that we just discussed the analysis, I
5 don't think there's any question that the class 02:04:09
6 representatives' claims are typical of the class. They
7 basically -- there's no allegation that before the defendants
8 engaged in the activity that we've said was illegal that any
9 class representative, with the exception of Mr. Yedlin, whom we
10 indicated that we've withdrawn, engaged in any activity that 02:04:31
11 under any theory could be problematic. So their claims are
12 typical.

13 It seems that more what their argument is, is that
14 they are not adequate class representatives and they try to go
15 through a recitation about each class representative. 02:04:50

16 So in some ways this brings us back to where we
17 started which is the defendants' contention is all based on the
18 notion that once the defendants use force, people should have
19 known that now it was an unlawful assembly and you have to
20 leave and here's how you're supposed to leave. 02:05:19

21 We disagree with that because our argument is, and
22 our common issue is, that's not true, that basically you
23 violated people's rights so let's take, for example -- and I'm
24 not sure I'm pronouncing the name right -- Ms. Guillen, so she
25 saw smoke at 8:39. That's what defendants say. This is long 02:05:51

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1 after they have used this force before they have announced an 02:05:54
2 unlawful assembly order and then she is struck by a grenadier's
3 muzzle at 8:50 so all of this happens beforehand.

4 And our position is that -- and, again, it's a common
5 issue -- when the defendants did this, the fact that people 02:06:15
6 didn't leave when they weren't given instructions to leave,
7 when there was no unlawful assembly announcement, there were no
8 dispersal instructions, it was not audible even when they did
9 do it, that the -- that individual plaintiffs remaining around
10 has nothing to do with the common issues. 02:06:37

11 Unless the Court wants me to, I won't go through the
12 others but it's similar in each case. The defendants are
13 trying to say, well, you know, people should have known. They
14 shouldn't have stayed around. One of the people, Ms. Goodman,
15 was, you know, partly responsible for the March. She went to 02:06:58
16 see if people needed help. She wouldn't have had to do that if
17 the police had conducted themselves properly. So, you know,
18 our view is that none of these issues matter. I would note
19 that if they were concerns for the Court, I don't remember
20 whether we cited cases for this proposition because it didn't 02:07:17
21 seem necessary. But I will point out that it is
22 well-established that when you're at the class certification
23 stage, if the Court finds that a particular class
24 representative is inadequate, then an opportunity is given to
25 substitute class members. So it's to substitute new class 02:07:35

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1 representatives.

02:07:42

2 So then the defendants spent a fair amount of time on
3 numerosity. I'm going to assume that for damages class, it's
4 general damages class and damages Class #1, that's not an
5 issue. I would point out that the class definition in damages
6 Class 1 that uses subjected to unlawful force, we cited -- I
7 don't think it was exactly in this section the brief.

02:08:14

8 We cited *Torres v. Mercer Canyons* decision from the
9 Ninth Circuit. It specifically talks about predominance being
10 met where there is a policy or pattern and practice that
11 subjects a whole number of people to that pattern and practice
12 even if some people weren't injured by it.

02:08:37

13 And *Tyson Foods* also talks about that. So I'm
14 assuming that -- and it certainly seems to be where the
15 defendants focused their argument on Subclass #2 is the only
16 numerosity issue at least.

02:09:00

17 So on that there seem to have been some confusion
18 because the defendants objected to the Peard declaration, but
19 all the Peard declaration did was summarize information that
20 was filed in the case in declarations and pointed out which
21 ones showed that people had identified themselves as not having
22 done anything and being hit by some projectile.

02:09:23

23 And through that we establish that 21 individuals
24 said that and we had about a dozen declarations from people who
25 said that they saw at least two people who weren't doing

02:09:53

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1 anything who got hit and then another 11 who saw one person. 02:09:58

2 Now there, may be some overlap among those --

3 THE COURT: And I think it was 18 that saw one
4 person. That was my question to you. How do you assume that
5 all of those are mutually exclusive? Because when you write in 02:10:12
6 your brief to me you have made that assumption.

7 MR. LITT: No. We're not making the assumption. But
8 the likelihood of given what we -- 590 projectiles, numerous
9 descriptions of people being hit, 21 self-identified people and
10 then other people identifying 30 or 40, some of whom may 02:10:37
11 overlap and some of whom may not.

12 But until we get to the stage where class notice is
13 given and if for this subclass, you would define within the
14 notice people self-identifying, self-identification in the
15 Ninth Circuit is perfectly acceptable. 02:11:01

16 THE COURT: I accept that on this point, your
17 argument on this point, that given the numbers of people
18 involved, the numbers of discharges that everybody agrees, that
19 there is a very decent probability that the numerosity
20 requirement, if measured that way, is met. 02:11:16

21 My point was simply that I expect, and will expect in
22 the future, great care from all of the litigants here to be
23 absolutely accurate, not sloppy, with the language that they
24 use. I'm going to have more to say about that on some other
25 things later, but I'm just trying to set the expectations now. 02:11:33

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1 MR. LITT: Okay. 02:11:37

2 So injunctive relief, defendants also argued
3 strenuously that there was not standing for injunctive relief.
4 I think simplest answer to that is that I would suggest that
5 the *Lyons* case definitively answers that question. The *Lyons* 02:12:00
6 case, which was a choke hold case in Los Angeles, and the
7 Supreme Court found that there wasn't standing there but it's
8 important to understand the context. The context was that
9 there was not a likelihood that the plaintiff would be faced
10 with the same issue again or engage in similar conduct because 02:12:25
11 it was criminal conduct, and there was a choke hold. And the
12 Court went on at some length about not assuming that people
13 were going to engage in criminal conduct.

14 Here on the other hand, people engaging in
15 demonstration, which is lawful constitutionally protected 02:12:44
16 conduct, is both appropriate and we have established class
17 representatives who will do that.

18 So then the question is, what do you need in addition
19 to that? And you need one of two things. Either you need some
20 indication of a pattern and practice. We've submitted 02:13:04
21 information which I recognize is disputed regarding that.
22 However the alternative of what you need is you need a policy.
23 We presented substantial evidence that all of the activity here
24 was commenced, that activity directed and headed by Chief
25 Williams, and then subsequently approved and ratified by Chief 02:13:32

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1 Williams which makes state policy and, therefore, under the
2 *Lyons* standard, we've established all of the elements of
3 standing.

4 THE COURT: Let me change things up just a little
5 bit. Let's assume that I don't agree with you that the policy
6 is sufficient for this point in terms of standing and you need
7 to rely on the other sort of alternative course which is a
8 pattern. Defendants have noted in their response, and you have
9 acknowledged here today, that the pattern evidence that has
10 been submitted to the Court so far comes in the form of
11 declarations of people who have witnessed other incidents
12 before involving protesters and interaction with the Phoenix
13 Police Department. You have acknowledged that that's disputed.

14 Do you have case law for me that supports the
15 proposition that the conclusions, non-legal conclusions, of a
16 witness in that circumstance, an affiant or a declarant, are
17 sufficient for that purpose when -- the wording I'm looking for
18 is the characterization or the classification of the police
19 actions at these prior incidents has not been either
20 adjudicated in a court or by an administrative body to be
21 unlawful but they are being characterized as such in the
22 declaration.

23 Do you see what my question is?

24 MR. LITT: I understand your question.

25 So I think -- I do not have, off the top of my head,

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1 any case law to clear that up initially. But I would say that
2 people's experiences, even if they are characterizations
3 because it wasn't just a characterization of unlawful. There
4 were more -- there was more descriptive information than that
5 and I think that it's lay opinion. You know, a layperson can
6 say, "I was standing there and the police attacked." Now, is
7 that like a legal conclusion and nobody did anything that I
8 saw. We could argue that it's a legal conclusion but it's also
9 the kind of conclusion that a percipient witness is in a
10 position to make. And the Court then can determine or the
11 trier of fact what credence to give it. But it's the kind of
12 information that is commonly presented by lay witnesses.

13 I'm not sure I have more to say to answer your
14 question for that.

15 THE COURT: Thank you.

16 MR. LITT: So I think I've adequately covered what
17 our legal theory is. So let me just go to predominance
18 quickly. We cited -- it is, I would say, very standard in a
19 case like this, and I've done several of them similar, cited in
20 the briefing that we provided the Court, that the common issues
21 predominate for the reasons that I explained which is that
22 you've got action against a crowd or a large group of people
23 and the question of whether or not that group action was lawful
24 or not is and has consistently been found to be predominant.
25 It goes back to the *Dellums* case, which is an anti-Vietnam War

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1 case from the seventies. This has been very consistent in the
2 case law and there are very few cases that don't do that.

02:17:41

3 The case that -- the class case that the defendants
4 seem to rely on, which we actually think supports us more than
5 the defendants, is the *Moss* case.

02:17:57

6 In the *Moss* case, the Court relying on *MIWON*, said
7 that the arrests were a common issue. But the use of force was
8 not a common issue but its reasoning is very informative which
9 is it said that it's not a common issue because it was not a
10 command decision that led to the use of force.

02:18:21

11 Here it's undisputed that the group force were
12 command decisions directed by Chief Williams. So the one class
13 case that the defendants rely on does not -- when you analyze
14 it, it did find that in that case but that's because it found
15 that there was no evidence that the command decision is what
16 drove the actions that were being challenged which is exactly
17 what we have here.

02:18:47

18 So -- and the Supreme Court has been very clear in
19 *Tyson Foods* and I think *Tyson Foods* is probably the most
20 informative, that it's expected that there are a large number
21 of individual issues. That's not really the inquiry. The
22 inquiry is whether or not there are critical common issues, the
23 resolution of which would advance the litigation to which there
24 are common answers. And under that framework, regardless of
25 whether or not the defendants can challenge whether individual

02:19:11

02:19:36

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1 A or individual B engaged in some kind of conduct, it made
2 certain actions later in the evening justified or not, we
3 predominate.

4 And in *Tyson Foods*, in fact, the class included
5 people who were not injured at all. And the Court said that is
6 not a problem as long as you figure out a way to, like,
7 distinguish them because you can't compensate people who
8 haven't been injured but it's ultimately for purposes of class
9 certification. That's not a problem.

10 Here it is standard in cases like this that what
11 happens is the liability issues and we'll get to whether any
12 class-wide damages but liability is certified and then at that
13 stage, the Court figures out, okay, how are we going to proceed
14 now? And the Court has a number of tools available to it to do
15 that. The *Carnegie* case by Judge Posner is probably the best
16 on this in that it talks about the Court has the ability to use
17 a special master. It has the ability to decertify the class,
18 settlement normally follows from a class-wide liability
19 determination.

20 And the Ninth Circuit's been crystal clear that there
21 can -- your individual damages issue can be all over the place
22 and that really doesn't matter. And I will tell the Court I've
23 done numerous strip search and protest cases, all of which have
24 been certified for liability with a recognition that leaving
25 aside class-wide general or presumed damages -- you'll deal

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1 with the damages later -- but the fact that they are individual 02:21:31
2 damages is really of no consequence.

3 And as I did mention earlier, the *Torres* case
4 specifically discussed predominance applies where a large group
5 was exposed regardless of whether they actually were injured to 02:21:52
6 a certain practice or policy which is precisely what we have
7 here.

8 So this brings me -- I don't know that I need to
9 spend a lot of time on Rule 23(c)(4). Really the rule that
10 individual damages do not defeat predominance is a form of 02:22:17
11 analyzing 23(c)(4). 23(c)(4) is most commonly used for
12 liability issues where there may be individualized damages.
13 The defendants -- and the *Valentino* case from the Ninth Circuit
14 makes it very clear. The defendants claim that that is *dicta*
15 to which I would respond I don't actually think it is *dicta*. 02:22:44
16 But we cited a case -- I forget the name of it at the moment --
17 that says, well, the reason *dicta* from the Ninth Circuit is the
18 law of the circuit. And this is the law -- this is uniformly
19 the law. At this point there's really not much dispute about
20 it. We have a footnote -- I think it was 14 but I may be wrong 02:23:07
21 about that -- that cites a law review article that says at a
22 point there seemed to be a split in the circuits about this but
23 at this point, there really isn't.

24 So I don't think there's any issue about the Court's
25 ability to certify for liability only and determine how to 02:23:30

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1 handle damages, including damages discovery for a later stage
2 when and if liability is determined and if settlement does not
3 occur.

4 So this brings me to the last issue which is the
5 general damages issue. And we've cited numerous cases to the
6 Court. I, having argued this issue on several occasions and
7 prevailed at times and not prevailed at times, there's not a
8 uniform view on this as to how to handle it.

9 But I would suggest that especially in a case like
10 this where, with relatively few exceptions, the damages are
11 exactly the kind of damages that fit into the framework of
12 general damages which is where there is injury. There has been
13 a deprivation of a right but measuring the injury is difficult;
14 that this is exactly the kind of case where it's appropriate.

15 It has been done in protest cases. It has been done in
16 over-detention cases. It has been done in First Amendment
17 cases. It has been done in strip-search cases. We cited the
18 *Batances* case. I don't want to get in for this purpose the
19 distinction between presumed and general damages in part
20 because, frankly, a lot of the case law is not very clear on
21 the distinction. But what I would say is that it is an
22 appropriate way to handle damages like this.

23 The most recent case that I have been involved in
24 which was cited to the Court is the *Roy* case in the Central
25 District of California. That case involved where the Los

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1 Angeles Sheriff's Department was holding people on an ICE hold.
2 ICE holds are requests, they are not lawful orders to detain,
3 but they were being detained on the basis of that. And the
4 Court ruled that that was a situation in which class-wide
5 damages were appropriate.

6 The other case that I would highlight for the Court
7 is the *Barnes* case, which we cited, and I highlight that case
8 because that case does in some ways the best job that I've seen
9 describing how you handle these kinds of damages. And the way
10 that you handle these kinds of damages is that the people --
11 the general presumed damages are not emotional distress
12 damages. They are damages for either injury to dignity or
13 basically the kind of damage that is inherent in the violation.

14 And so what Judge Lamberth did in that case was he
15 said, okay, we're going to have that but neither class members
16 called by plaintiffs or defendants can talk about sort of how
17 they felt. They describe what happened.

18 Now, in this case that could include the -- you know,
19 the physical manifestations of, like, tear gas, for example,
20 but it wouldn't include -- this brought back memories of things
21 and such-and-such. The *Barnes* case does a good job of
22 describing how it would be presented. Actually, it's a pretty
23 streamlined procedure and actually in a case like this, it
24 provides a very meaningful mechanism for compensation in what
25 otherwise could be a difficult process.

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1 I think I've covered everything. So I don't know
2 whether the Court has other questions.

02:27:48

3 THE COURT: I have a few. We touched on some issues.
4 I thought I might wait on those and then let's go back to the
5 issue of the certification of a class for injunctive relief.
6 My first question to you is, what is gained by having a class
7 for injunctive relief here? My sense of how any injunctive
8 relief would play out in a case like this would be that the
9 result, if granted, would be that the Phoenix Police Department
10 must take certain actions in certain situations or must refrain
11 from taking certain actions in certain situations, let's say
12 protest situations, then that would be the result whether there
13 were a single plaintiff, 20 named plaintiffs or a class.

02:28:04

02:28:38

14 MR. LITT: So I understand what you're saying but
15 technically I don't think that's correct. The reason is, if
16 you have an injunction -- let me take a case that is sort of
17 concrete as an example that I'm involved in presently involving
18 towing vehicles for people who don't have a license or have
19 their license suspended.

02:29:02

20 And in the case that I'm thinking of, the individual
21 plaintiff sought injunctive relief. But if the individual
22 plaintiff had gotten an injunction, the injunction would say
23 you can't do this to plaintiff A because that plaintiff doesn't
24 have the ability to say you have to adopt a policy for -- so
25 the reason that you have a class in situations like this is

02:29:29

02:29:46

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1 that that's the procedural mechanism to get to the point that
2 you're making which is that --

3 THE COURT: Mr. Litt, is a police officer supposed to
4 ask somebody at a protest if they are a class member or not
5 from this litigation before they decide which procedures they
6 are going to follow? 02:29:52

7 MR. LITT: No. But the class definition says
8 people -- it gives a generic description of people who are
9 engaged in protest activity including in the future. So it's
10 not limited to the people who participated in the Trump
11 protest. 02:30:04

12 THE COURT: Well, let me read the definition because
13 it strikes me that it encompasses pretty much anybody that
14 wishes to protest in the future and is lawful in their behavior
15 at that protest. 02:30:18

16 MR. LITT: Well, I agree with that. I think it does
17 do that.

18 THE COURT: So who doesn't that cover that plaintiff
19 would be concerned about if there were no class established?
20 Doesn't that still cover the universe, though, population of
21 the entire world if they happen to be in the District of
22 Arizona or within the jurisdiction of the Phoenix police? 02:30:33

23 MR. LITT: Well, the issue is, can the Court enter an
24 order and would the defendants agree that the Court can enter
25 an order that basically says without certifying an injunctive 02:30:48

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1 relief class, that the Phoenix Police Department can no longer 02:31:13
2 do A, B, C, D, or E in protest or must do A, B, C, D, or E in
3 protest? I've always seen it handled that way in order to
4 avoid the issue that it only applies to the individual
5 plaintiff. I've always seen it handled as an injunctive relief 02:31:34
6 class. The *MIWON* case is an example but there are numerous
7 other examples.

8 THE COURT: Were any of the same sex marriage cases
9 against County Recorders brought as class actions? They were
10 individual plaintiffs; right? 02:31:52

11 MR. LITT: They were individual plaintiffs.

12 THE COURT: And the result of that was that the
13 County Recorder can no longer refuse to record the marriage of
14 the same sex couple, whether plaintiff or anyone else.

15 MR. LITT: The result of that was at a certain point, 02:32:05
16 the law became established that they couldn't and they stopped,
17 although they didn't have any court order requiring that.

18 THE COURT: All right. The last question I suppose
19 having to do with class for injunctive relief. The complaint
20 states that as to each of the individual plaintiffs, some of 02:32:40
21 them there's some variation but at minimum, each of the
22 paragraphs dealing with the plaintiffs in the complaint
23 indicated that those individual plaintiffs were chilled from
24 attending or participating in future protest events and that
25 was specifically for the purpose of addressing the issue we're 02:33:02

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1 at now.

02:33:05

2 In defendants' response brief, they note individual
3 instances where most or all of those plaintiffs have, since the
4 events of August of 2017, attended and participated in
5 protest-type activities including, in most cases, within the
6 ambit of the Phoenix Police Department.

02:33:24

7 Number one, can I consider that information coming to
8 me as it does in that posture, in a response brief, and, two,
9 if I can, isn't that problematic for purposes of standing or
10 class injunctive relief? In other words, what's the harm,
11 then?

02:33:49

12 MR. LITT: I guess to answer the first question. I
13 think technically it's improper that it's in a response brief.

14 Having said that, my experience is that if courts
15 want to consider it, then they will say to the plaintiffs,
16 well, you can respond or whatever.

02:34:06

17 So let me go to the substance. And I think the
18 substance is that chill, which is a term of art, is not the
19 same as prevent so the fact it can chill you in numerous ways.
20 It can make you reluctant if you're not feeling well because
21 you don't know whether you're going to have to run. It can
22 make you concerned about whether you would bring a patient or a
23 child if there's a -- you know, a meaningful threat that
24 something might happen and you're not able to do it. Chilling
25 can -- has many more manifestations than whether or not the

02:34:29

02:34:47

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1 individual will participate in a particular protest. It might 02:34:53
2 mean that they decide for some where they think it's, you know,
3 more volatile that they would not. Then at others they would.

4 So I think the answer is that on the merits, the fact
5 that they participated later really doesn't speak to whether or 02:35:14
6 not their activities were chilled.

7 THE COURT: All right. Thank you, sir.

8 Next question that I have for you, moving on to a
9 different subject. I want to take a step back. I indicated to
10 you previously I had a question or two on the proposed damages 02:35:29
11 class definition or definitions and subdefinitions I suppose.

12 One of the class definitions would be limited or
13 delimited to persons that were, among other things, subjected
14 to the Phoenix Police Department's use of gas, pepper spray,
15 PepperBalls® or other chemical agents. So my question is, who 02:35:58
16 is subjected to those things? I'll set it up. We've got --
17 pick your number -- 5,000, 6,000 people within what has been
18 delineated as the Free Speech Zone. That Free Speech Zone
19 essentially surrounds the Herberger Center. And I know you're
20 not from Phoenix, Mr. Litt, but I'm very well aware of that 02:36:25
21 real estate. It's essentially the exterior of a very large
22 complex of buildings that cover an entire city block so there's
23 four blocks we're talking about. The focal point is the block
24 of Monroe Street between Second and Third Streets. But it also
25 includes Second and Third Streets themselves between Monroe up 02:36:48

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1 to Van Buren and then the other side of Van Buren from Second
2 to Third.

02:36:51

3 So there are 6,000 people at any point in that area,
4 some of whom are 400, 300 feet away from each other with a
5 large building in between them. Taking, for example, the
6 initial the discharge of the PepperBalls® at the purported
7 Antifa area, which is essentially the southeast corner of that
8 quadrant that I've just described. I am a non -- if it is
9 Antifa, I am a non-Antifa person standing in the Free Speech
10 Zone right next to the black banner, right next to the section
11 of the fence that's being shaken and I get hit by something
12 coming off of a PepperBall®, I would understand that I am
13 subjected to the police force's use of gas.

02:37:09

02:37:32

14 I am a person standing on the corner of Third Street
15 and Van Buren 300 feet and a whole lot of concrete were between
16 at the time that goes off. I'm expecting that you're not going
17 to tell me that person was subjected to that particular use of
18 force or am I getting your theory -- am I squeezing your theory
19 too much?

02:37:56

20 MR. LITT: I think some of both. I would say that
21 the PepperBalls® don't have as far a radius but they do have a
22 substantial radius impact. The tear gas has very substantial
23 radius and radiates much the farther out. Our class definition
24 encompasses both.

02:38:21

25 So I think -- but where there is a potential

02:38:46

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1 distinction is taking if you're on the other side of Monroe and 02:38:51
2 you weren't -- you didn't feel the impact at all of the pepper
3 spray or the tear gas is then perhaps you weren't subjected to
4 it. But you still fit within the main class definition because
5 the main class definition stands independently of whether you 02:39:13
6 were a subject of force because it also encompasses the First
7 Amendment. And regardless of whether you were subjected to
8 force, as a member of the main class, your First Amendment
9 rights were violated.

10 So this distinction is largely to ensure that we're 02:39:32
11 covering everybody. Look, there's an argument that the initial
12 class definition does cover everybody and the rest is a
13 question of damages, but the main basis of the distinction is
14 to make sure that the Fourth and First Amendment are understood
15 as independent violations. And for the Fourth for damages, 02:40:04
16 Class 1 to basically encompass anybody who was subjected to the
17 force. And if the defendants want to argue that some people
18 weren't, then, you know, you deal with that later. But that's
19 the underlying reasoning for the distinction that we've made.

20 THE COURT: The problems that I'm having with it are 02:40:30
21 degrees upon degrees of what you just mentioned. So actually,
22 to me, if you're on the south side of Monroe, that's easy
23 because you're not in the defined area; but if you're on the
24 north side, you are. But you still have the issue of I've got
25 the person right next to the discharge of the PepperBalls® 02:40:49

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1 versus the person that is as far geographically as far away and 02:40:51
2 then everybody in between. And at what point does the law
3 get -- does the line get drawn in terms of subjected to? Is it
4 physical distance? Is it I saw the smoke but it didn't
5 irritate me. It did irritate me but not that much? These to 02:41:10
6 me sort of speak to the point that the defendants' making which
7 is that they are individualized questions on top of something
8 else I haven't gotten to yet, which is -- well, there are two
9 interlaced questions. One of them is don't I have to make a
10 determination as to class certification with regard to each of 02:41:42
11 the claims?

12 MR. LITT: No. At least that's in my experience. In
13 fact, I can't think of a case where the class definition has
14 been tailored to the claim because the idea is to define the
15 impacted group and the question of what rights were violated. 02:42:10
16 Because even if we didn't identify in the complaint a violated
17 right, if the complaint-stated facts give rise to that
18 violation under federal pleading standards, you still stated a
19 claim for that. So that the class definition stands as a
20 definition of a group of people who were subjected to certain 02:42:34
21 conditions or treatment, not what of those conditions or
22 treatment violated what rights.

23 So I would suggest that you do not have to and it is
24 not standard that the class definition is tailored to the
25 particular violation. 02:42:56

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1 Take the *MIWON* case which is a good example. It 02:43:00
2 involved both First Amendment and Fourth Amendment claims.
3 There was a single class definition. In the *Aichele* case,
4 which is a protest arrest case, which also involved similar
5 accusations, there was a single class definition. It's pretty 02:43:17
6 standard, in my experience, because what you're trying to do is
7 objectively define a group that is covered by your claim in the
8 generic sense, not by your individual claims but by the
9 complaint.

10 Did that answer your question? 02:43:47

11 THE COURT: Yes. Thank you.

12 Somewhat related. There is the potential that what
13 you just laid out for me, if Court ultimately concludes that,
14 as a matter of law, that's correct, it might obviate this next
15 question but I need to ask it now so that I have an 02:44:16
16 understanding of your position.

17 When I'm looking at the claims as against the
18 individual officers as opposed to the -- and I'm talking about
19 the excessive force claim, as opposed to the excessive force
20 claim against the Phoenix Police Department as a whole or at 02:44:39
21 somebody at command level through whom all either policy or
22 directives flowed. But as I look at the individual grenadiers
23 that were named, how in that situation does the plaintiff meet
24 the common question requirement given that Officer Turiano, for
25 example, is taking described actions in one place at one time 02:45:02

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1 that impact individuals but not other individuals who might
2 have been impacted by something that Officer Sticca did
3 somewhere else along the line or at a different time?

02:45:05

4 MR. LITT: Well, so I would answer that in two ways.
5 The Ninth Circuit has this doctrine -- I don't think we've
6 discussed it anywhere -- of integral participation and so our
7 argument that the class certification encompasses the
8 individuals is based on the fact that they were all integral
9 participants in this activity; and regardless of which
10 individual action they participated in, they were part of a
11 larger group activity.

02:45:26

02:45:51

12 THE COURT: That's problematic for me because it
13 means if I accept it, individual officers are being held
14 responsible to a class for acts that they did not take. It's a
15 different question and there's not a dissatisfaction from a
16 logical standpoint with this Court that the police department
17 itself or someone in command could theoretically be in that
18 position because, again, everything flowed through them. But
19 as to the individual officers, that is a hard pill for me to
20 swallow without real clear law telling me yeah, that's okay.

02:46:12

02:46:31

21 If officers had individually been named as defendants
22 in a failure to intervene claim or something like that -- but
23 we don't have that. Here, as I've said before, Officer Sticca
24 may be held responsible to a class for something that happened
25 at the far end of the quadrant that he had nothing to do with.

02:46:54

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1 MR. LITT: Look. I understand. I will cite one 02:47:01
2 other case. I don't remember if it's in a brief. I think it's
3 a Fifth Circuit case. The *Grandstaff* case. If we didn't cite
4 it, we can provide to it the Court which was a situation in
5 which officers were involved in, like, an evening of attacks, a 02:47:16
6 whole bunch of officers against a variety of people and
7 basically they used the analysis that also provided the basis
8 for Monell.

9 Having said that, I wanted to make clear that I do
10 think there is a legitimate issue about whether or not the 02:47:42
11 class certification should run to the individuals. The key
12 defendant for the class is the City. This is -- this is
13 essentially a Monell claim. There are -- there are individual
14 actions. But what I think is relevant for those people and why
15 it makes sense for them to be included at least at this stage 02:48:12
16 is that the liability determination of whether or not -- let me
17 take one theory of -- one of our theories is that the initial
18 conduct, which we contend was illegal, basically caused the
19 reaction of the crowd. And so it's not -- it's not a
20 legitimate use of force for individual grenadiers to engage in 02:48:39
21 follow-up actions against individuals because basically the
22 initial action was the catalyst for whatever followed and they
23 can't use their initial unlawful action as a defense. So there
24 are going to be class issues that then impact any determination
25 regarding individuals. 02:49:09

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1 Having said that, it's also our position that the 02:49:15
2 Monell claim runs throughout because it was the City that was
3 responsible for these decisions and, therefore, the City is
4 responsible for the subsequent individual interactions that the
5 defendants attempt to justify. 02:49:33

6 So I guess in summary, I would say the best that I
7 can offer the Court and if the Court wants, we can provide some
8 follow-up briefing, is the integral participant doctrine. But
9 in any event, it doesn't impact the core class claim which is
10 against the City. 02:49:56

11 THE COURT: All right. Thank you. I understand your
12 position now, Mr. Litt.

13 Just one or two more things for you. There was an
14 Exhibit 28 to the motion for certification and the exhibit is a
15 collection of declarations from individuals who were present at 02:50:17
16 the August 2017 gathering laying out their experiences.

17 The declarations appear to be identical or near
18 identical in terms of text right down to in every single
19 paragraph 13 of everyone of these multiple declarations there's
20 a statement that says, "I did not hear a warning." My point is 02:50:48
21 not with typographicals. I understand. My concern, though, is
22 that no one corrected that or anything else in any of these
23 declarations, and there are many of them. They just signed
24 them. And so my concern is, how much weight is the Court to
25 put on these declarations that were, obviously, drafted 02:51:10

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1 uniformly by someone else? And, again, I understand attorneys
2 do that in cases; but where I have no sense of comfort that
3 anybody individually looked at these and said, "Yeah, this is
4 accurate as to me, as to what I experienced, as to what I felt,
5 as to what I feel now," because those are the questions being
6 asked. And if I credit them, they would go to the weight of a
7 point or an argument that plaintiffs are trying to make here,
8 perhaps unfairly if the documents were really not read,
9 policed, and endorsed by the signers.

10 MR. LITT: So -- well, leaving aside the
11 typographical error, my understanding -- and I will confess I
12 was not involved in this part of the process is that there was
13 intentional efforts to have criteria for who would file the
14 declarations, the idea being to make certain key points. This
15 was not the place to describe the whole of their experience.
16 It was to basically identify a checklist of issues that were of
17 significance to the class certification motion and then
18 identify those class members with whom the lawyers were in
19 touch to ensure that this applied to them.

20 And so in that sense, it was a uniform declaration by
21 design. It was intended not to describe the whole of their
22 experience. It was really intended to meet certain standards
23 about whether they engaged in or saw violence, participation in
24 other events, things like that.

25 So I don't think in the circumstances for our

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1 purposes, there's any negative inference to be drawn from the 02:53:21
2 fact that by design, these declarations will read -- they don't
3 all read the same but most of them read very similarly, you
4 know, basically said pretty much the same thing for the
5 experiences, because that was what they were designed to do. 02:53:43

6 THE COURT: All right. Thank you.

7 Last thing I have for you, Mr. Litt, I'm going to
8 take you back to the complaint for a moment. This is something
9 I need to address now.

10 In paragraph 43 we're in the section of the complaint 02:53:59
11 where the plaintiff is stating allegations pertaining to
12 excessive force by the police department and the paragraph
13 essentially alleges that the police department did not attempt
14 to identify or to separate from the gatherings of any Trump
15 protesters any individuals they considered to be problematic or 02:54:18
16 possibly engaged in improper conduct.

17 As later events revealed, the police department
18 instead opted for a, quote/unquote, let's fire on all tactic
19 that endangered the rights and well-being of hundreds of
20 peaceable persons, including children and the elderly, and then 02:54:35
21 it closes with PPD personnel were apparently trained in the
22 tactic of firing on all in a crowd as the best method for
23 shaking out one or two persons of concern even if present at
24 all.

25 Is that to be understood as actually the allegation 02:54:50

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1 or was that sarcasm, that last? 02:54:55

2 MR. LITT: I didn't participate in writing the
3 complaint. I would say that last is extraneous.

4 THE COURT: Mr. Litt, I understand that you did not
5 participate in writing the complaint. I accept your avowal
6 here. The attorneys are responsible for the product. Without
7 putting too fine a point on it, because it happens again in
8 paragraph 47 with regard to what I would characterize and took,
9 again, as to a sarcastic comment regarding Officer Scott who it

10 says was apparently trained that he could ignore the PPD 02:55:12
11 policies. My point is this: This Court will always draw a
12 very bright line around the function of the third branch and
13 the rules that are in place and the requirements to make sure
14 that that function is strictly adhered to and we don't go
15 anywhere else. 02:55:37

16 There are other aspects of Government and other
17 entities where sarcasm, ridicule, political statements,
18 otherwise may be appropriate but here my expectation with
19 regard to all litigants is that they show the respect to this
20 process and to the participants by following the rules. And 02:56:06
21 the allegations are allegations of fact and argument of law and
22 nothing more, and I'm not going to say anything else about that
23 at this time. 02:56:28

24 Mr. Litt, thank you. I will -- because you have the
25 burden here, allow you a brief rebuttal after I've heard from 02:56:46

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1 defendants.

02:56:49

2 Mr. Rosenbaum or Ms. O'Grady, who will be arguing?

3 MR. ROSENBAUM: Your Honor, it will be me, Dave
4 Rosenbaum.

5 THE COURT: Okay. Mr. Rosenbaum, we're going to take 02:56:56
6 a quick break before we do. Everybody has been in their seats
7 for an hour and a half. Let's take until five after.

8 Julie, is that enough?

9 All right. Five after we'll resume.

10 COURTROOM DEPUTY: All rise, please. 02:57:08

11 (Recess 2:56; resumed at 3:05.)

12 THE COURT: Thank you. Please be seated.

13 And Mr. Rosenbaum, you can proceed whenever you're
14 ready.

15 MR. ROSENBAUM: Thank you, Your Honor. 03:06:03

16 May it please the Court, plaintiffs have failed to
17 meet their burden under *Dukes* to show, after a rigorous
18 analysis by this Court, that any class should be certified, the
19 injunctive relief class or the proposed damages class.

20 I want to start with the proposition that is 03:06:24
21 axiomatic that we all understand and that is that class
22 certification in personal injury cases, which this is, is
23 almost always inappropriate.

24 In fact, if you look at the notes to the rule
25 amendments from 1966 where Rule 23(b)(3) was added to add the 03:06:45

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1 predominance element, the Advisory Committee says that in mass
2 tort accident cases, and I'll quote, resulting in injuries to
3 numerous persons is ordinarily not appropriate for class action
4 because the likelihood of significant questions not only of
5 damages but of liability and defenses to liability.

03:06:48

03:07:11

6 That's why, on the sixth floor in the MDL action that
7 Judge Campbell is handling, there have been a series of
8 individual trials, individual trials on liability, individual
9 trials on damages, even though they are common issues that are
10 decided at the MDL level. When the MDL is over, hundreds, if
11 not thousands -- I don't know how many there are -- of
12 individual cases will be remanded to the district courts from
13 which they came for individual trials because they are personal
14 injury cases, notwithstanding same product, command level
15 decisions presumably, how they were designed, what was known.

03:07:31

03:07:57

16 So there are rare, rare exceptions to that axiomatic
17 rule and some of them are a handful of mass arrest cases or
18 detention cases. That's not this case.

19 And if you read the *Moss* case, for example, where the
20 Court certified a class, it was for the mass roundup all at
21 once of a group of people -- and that was a command level
22 decision, right, to round them up. As a result, many of the
23 protesters were injured. The Court declined to certify a
24 class.

03:08:23

25 We don't have one mass roundup of individuals unlike

03:08:46

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1 the other cases. What we have is a series of events in 03:08:51
2 different locations that transpired over the course of the
3 evening with different deployments of different munitions
4 directed at different individuals by different officers.

5 THE COURT: Well, let me stop you there for a second 03:09:10
6 and ask you, starting point and it goes exactly to that issue.

7 Don't I have to take at face value all of the factual
8 allegations in the complaint for purposes of evaluating this
9 motion on class certification?

10 MR. ROSENBAUM: No. *Dukes* says exactly the opposite. 03:09:30
11 The plaintiff can no longer stand on allegations. Court is
12 allowed to look, is required as part of the rigorous analysis
13 to look behind those allegations.

14 And what the *Haliburton* cases says, which we cite, is
15 that what matters are the underlying elements of the claim, not 03:09:49
16 what plaintiffs' theory is. What do they have to prove to
17 actually win at trial? And let me talk about the excessive
18 force claims. This comes right out of the joint proposed case
19 management submission, docket 43. Both sides agree what are
20 the elements of the fourth amended claim; that officers seized 03:10:17
21 the plaintiffs by excessive force; that officers acted
22 intentionally, each one of these defendants, including command
23 level officers, and that the force was unreasonable.

24 And what is unreasonable force? Force that is
25 unreasonable given the totality of the circumstances. Each 03:10:37

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1 action has to be investigated separately no matter what their
2 theory is. That is what the trial has to be about, looking at
3 each deployment.

03:10:41

4 And Mr. Litt said it's almost uncontested that these
5 were all command decisions. Well, of course not only is it
6 contested, but the record shows that that is wrong. We have
7 the deposition testimony and the declaration from the Field
8 Force Commander, Lieutenant Moore, who said: I made certain
9 orders. For example, I made the first order to deploy

03:11:02

10 PepperBall®, but I gave authorization to the grenadiers to make
11 their own independent judgments about other uses of force.

03:11:21

12 Your Honor referenced Officer Turiano in his
13 deposition which we submitted in our supplemental brief
14 submission. Thank you for reading it, Your Honor. He made a
15 series of individual decisions as he saw protesters throwing
16 chemical agents back at the police. He made the decision to
17 throw, not -- to deploy, not Chief Williams, not Field Force
18 Commander Moore. He made that decision. And at a trial, that
19 is what matters, not a, I would say, farfetched intenable
20 proximate causation theory.

03:11:42

03:12:13

21 And if you listen to Mr. Litt, read their briefs,
22 they are really saying two things caused everything to happen
23 and individual decisions later don't matter. One thing was you
24 should have gone in and arrested Antifa before anything
25 happened. Little bit ironic that these plaintiffs are saying

03:12:32

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1 that the police should have gone in and arrested individuals
2 because of the way they looked, because of the signs they held
3 before they committed any crime -- but that's their theory --
4 and nothing would have happened.

5 Or you shouldn't have deployed PepperBall® because
6 without PepperBall®, nothing else that evening would have
7 happened. That's not true because what the record shows -- and
8 I know Your Honor looked at video. But in a moment, if Your
9 Honor would permit, I have a few snippets of video --

10 THE COURT: I'm going to see a rerun, is that what
11 you're telling me? No, that's fine. Go ahead.

12 MR. ROSENBAUM: And I'm happy to skip it but I know
13 we transmitted I think collectively hundreds of hours of video.
14 So I want to focus on this. But the testimony from
15 Lieutenant Moore is that after deployment of PepperBall®, his
16 objective was to allow the free speech to continue. That's an
17 individualized issue, not only on the excessive force claim but
18 the First Amendment claim because what was the primary purpose?
19 Was it to stifle free speech or was it to legitimately stop
20 behavior?

21 The only evidence is that it was the latter. He
22 wanted to stop this attempt to breach the fence. We never said
23 the fence was breached. We said it was an attempt to breach
24 the fence at precisely the moment of the Vice President of the
25 United States, Vice President, Cabinet members are leaving the

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1 Convention Center. And they are attempting to breach the fence 03:14:13
2 into this safety corridor, right, which is there for, as the
3 name suggests, safety access, emergency vehicles.

4 So he had to stop the breach and the attempted breach
5 and it appeared to have worked. There was no intention to 03:14:31
6 deploy smoke, any further munitions, tear gas at that point.

7 What happened next was chemical agents thrown at the
8 police from the crowd, clearly depicted on the video, no
9 dispute about that. So what caused a later response from the
10 police was that tear gas from the crowd. How did they first 03:14:54
11 respond? With inert smoke, then a spear is thrown from the
12 crowd, continuing bottles and rocks. So these are all
13 individualized decisions that predominate. But my point is
14 that they can't overlook those individualized issues that
15 predominate by saying their theory is that it don't matter. 03:15:23
16 The theory is the PepperBall® caused it all.

17 What if this case was against the weathering bureau
18 had a monsoon storm caused a deluge at 8:25, none of this would
19 have happened. I don't think that's a viable cause of action.
20 More importantly, more importantly is that is not what the jury 03:15:45
21 will be asked to decide. That's why they named these
22 individual defendants. And I suggest, Your Honor, that's why
23 they defined the class to exclude individuals against whom
24 force was not necessary; right? If their theory could hold
25 water, it doesn't matter. Everything had occurred because 03:16:15

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1 there wasn't a monsoon storm. Everything occurred because
2 there was no mass arrest of lawfully protesting Antifa members.
3 Nothing would have happened had PepperBall® not been fired and
4 succeeded against those members of Antifa.

03:16:17

5 It's not a viable theory under *Haliburton*. It's
6 irrelevant to the Court's determination of whether
7 individualized issues predominate. We know they predominate
8 because this is a case involving a series of different actions
9 over the course of the evening by different officers, not under
10 a command decision against different individuals who, evidence
11 shows, at least in many cases there's a serious fact question
12 about whether the use of force, in fact, was authorized against
13 them.

03:16:36

03:16:59

14 THE COURT: Before you move away from this too far, I
15 don't want to forget this question. If the Court is to look
16 behind the allegations, what is your best case or argument that
17 plaintiff is incorrect when they allege that defendants use
18 generalized force against the whole protest?

03:17:20

19 MR. ROSENBAUM: Every minute of video that has been
20 submitted there is not a piece of evidence submitted by either
21 party in support or opposition to class certification that
22 supports that statement. It's simply wrong. It's simply
23 wrong.

03:17:49

24 Maybe the best place to start is video and I can give
25 some examples. I was --

03:18:06

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1 THE COURT: You can but I would like you to address 03:18:08
2 this. I'm happy to watch the video and I'm not dissuading you
3 from playing it. But if I use one of the snippets as an
4 example, every time I watched the deployment of the first
5 PepperBalls® to the westernmost quadrant of the Free Speech 03:18:22
6 Zone where the Antifa banners were, yes, it is clear they are
7 within a radius once they get to the fence of about 20 feet, no
8 more, approximately. But plaintiffs' argument is, if I have it
9 correctly, that that's generalized force against the whole
10 protest, not because the PepperBalls® necessarily affected 03:18:51
11 every single person directly; but they caused a wave or a swell
12 or whatever, putting people at risk, causing people to run.
13 Not enough?

14 MR. ROSENBAUM: Not at all. Not at all. Right
15 there, their class is of -- depending on which class they are 03:19:05
16 trying to define, not just the handful of people who were right
17 next to that Antifa group at 8:32. And what the video shows to
18 me is a couple of things. One, it's PAVA powder that's in the
19 PepperBalls® has individually no impact to anybody at the
20 sides. If it did, they would be running away. They would be 03:19:28
21 choking. They would be tearing. It doesn't have that effect.

22 The effect it has is that Antifa people back off of
23 the fence. They come back a second time, Mr. Yedlin shakes the
24 fence violently. They back off.

25 If you look at whether it's hundreds or thousands of 03:19:46

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1 people to the right and the left to the east and the west, they 03:19:48
2 are not moving. They are not moving. And, again, the question
3 of whether the deployment of force was reasonable has to be
4 judged by the totality of the circumstances at 8:32 p.m. And,
5 for First Amendment purposes, what was the intent of those who 03:20:11
6 fired of Field Force Commander Moore? The intent, undisputed,
7 was not to stop the protest. The intent was to drive back
8 Antifa from the fence so that the protest could continue.

9 So that the deployment of force is entirely
10 different. It's individualized. To the extent anybody claims 03:20:37
11 that they may have been impacted by a poof of PAVA powder,
12 because they are right next to it, their claims are very
13 different than somebody who was there an hour later and hears
14 the lawful assembly announcement and decides to stay and is
15 exposed to tear gas. 03:21:00

16 So what's the next deployment that we see on the
17 video? I do want to show this. It convinces me more and more
18 that perhaps we would both benefit from this. The next
19 deployment from Phoenix PD, after the use of PepperBall®, comes
20 in response to tear gas from the crowd. So what's the first 03:21:20
21 use of tear gas which is going to have some level of
22 indiscriminate impact on bystanders? It's from the crowd.

23 THE COURT: Yes. Let me ask you about that. There
24 are references in at least defendants' brief and maybe both
25 about a bluish-green gas. Is that not a product that the 03:21:42

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1 defendant officers deployed at any time?

03:21:46

2 MR. ROSENBAUM: No.

3 THE COURT: So white and yellow yes, but not blue or
4 green or gray?

5 MR. ROSENBAUM: Gray, yes. That blue smoke
6 clearly -- you can see it come from the crowd, was not in the
7 Phoenix PD possession. If you see yellow emissions, that's in
8 our smoke. The record is Phoenix PD doesn't possess any CS gas
9 in any color other than white but they do have smoke in a white
10 or gray color.

03:21:55

03:22:26

11 And the record is also clear, the first deployment of
12 any grenades which are rolled to the ground, they are not
13 thrown indiscriminately to the crowd -- you can see them rolled
14 to the front of the crowd -- was just inert gas.

15 What I would like to do just to show this point, if
16 Your Honor wouldn't mind, is play a snippet. This is from
17 Defendants Exhibit 52. This is the video portion of it.

03:22:44

18 Ms. Burns, don't hit "play" until I give the
19 background.

20 So if I may approach this sign just to give you a
21 perspective. So this is a bird's eye view from the east.

03:23:10

22 THE COURT: Hang on just a second, Mr. Rosenbaum.

23 Counsel, if you need to move to view it, you have
24 free reign to move about the well.

25 MR. ROSENBAUM: So the Exhibit 52 is a video camera

03:23:25

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1 taken from I believe the Civic Center wall. You can see it's
2 looking slightly north but mostly to the west down Monroe. And
3 you will see the first deployment of smoke, the yellow color in
4 this video. And my intent was to show, number one, the
5 localized effect of the smoke which doesn't cause any injury,
6 it's just smoke. It is a warning. Move out.

7 To be clear, I wanted to talk a little bit about
8 unlawful assembly declarations but the testimony from
9 Lieutenant Moore is once there's tear gas being thrown from the
10 crowd and spears, right, the PepperBall® didn't do its thing,
11 the police have no choice but, number one, to put on their own
12 gas masks and clear this area. And that's the purpose of the
13 smoke, no opportunity to call in a helicopter or to bring
14 unprotected officers out to use the LRAD and make an
15 announcement.

16 The smoke is the announcement and it works and that's
17 the point of this video. Number one, you can see the localized
18 nature of where the smoke is, but how the crowd -- not in panic
19 but very slowly -- they know which way to go. Don't go against
20 the pedestrian fencing, go north. They are leaving on Third.
21 Whether it's hundreds or thousands, I don't know. They are
22 captured in the proposed damage class, depending on how you
23 define it. They heed the warning. They are uninjured, they
24 leave.

25 (Video played.)

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1 MR. ROSENBAUM: I think that video is pretty clear. 03:25:37
2 You can see, by the way, that yellow smoke has now been kicked
3 from members of the crowd at the police. But those people are
4 feeling no adverse effect of any chemical agents. The smoke
5 hasn't reached them. They are all leaving calmly in one 03:25:50
6 direction to the north.

7 That the deployment of smoke has to be assessed. Was
8 it reasonable under the circumstances? To the extent that any
9 of these people calmly leaving up Third are members of a First
10 Amendment class, they want nominal damages. The individualized 03:26:15
11 question at that moment in time was, was that the deployment of
12 smoke an intent to deprive them of their First Amendment rights
13 or an attempt to clear the plaza from the people who were
14 throwing their own tear gas at the police?

15 I suspect any jury would side with us and, yes, of 03:26:35
16 course you're going to deploy smoke at that point in time. But
17 that is an individualized question, not a command decision.
18 Chief Williams didn't give instructions about when to deploy
19 smoke. That based on the individual's training and the police
20 policies and procedures. 03:26:57

21 Lieutenant Moore gave general instructions to use
22 smoke and then to use CS gas, but it was up to each individual
23 grenadier when to deploy, where to deploy.

24 This is of -- they say over 500 deployments but be
25 clear most of the 500 are rapid fires out of a PepperBall® gun, 03:27:26

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1 so that initial Antifa probably accounts for, I don't know, a
2 couple hundred. So the notion that -- I'm jumping ahead to
3 numerosity -- that because there were 500, that you've got to
4 have at least more than 20, maybe 40 who were hit with impact
5 munitions, nonsense, not at all.

03:27:31

03:27:46

6 And of course anybody impacted by PAVA smoke is not
7 part of that Subclass #2. Those are impact munitions. The
8 fight over whether it's as high as 21 or much smaller, and
9 certainly not 40, has nothing to do with PepperBall® PAVA being
10 released. If it's Mr. Yedlin who is hit with PepperBall®, then
11 he's no long area class representative but they would still put
12 him in Subclass #2 because he was actually hit with
13 PepperBall®.

03:28:11

14 So if Your Honor has the patience to see a little bit
15 more of this and maybe I'll narrate, play a small portion of
16 Defendants' Exhibit 42, which is what's been called on the
17 record the compilation video. It was actually a compilation
18 made up by the City of Phoenix after the event to help explain.
19 But it's nice because it has built-in circles and arrows so you
20 can see what's coming from the crowd and how the police
21 respond.

03:28:34

03:28:56

22 So Mr. Litt said that there were no plain clothes
23 officers trying to talk to Antifa, directly contrary to the
24 record. In fact, if you see the gentleman in the white khaki
25 pants -- that's my arrow -- and the bald head, my arrow, he is

03:29:23

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1 not a TRU officer, he's not a grenadier. He's with the
2 Community Relations Board. You will see these men and women
3 walking up and down the corridor here throughout the evening,
4 up until 8:32.

5 He is -- and if you look at earlier video, he's, in
6 fact, trying to talk to Antifa. The record on what Antifa said
7 in response to those attempts is, if I were to quote it,
8 wouldn't be suitable for this courtroom, but something like,
9 you know, F, F you. But at this point in time, plain clothes
10 officers are still there. The TRU officers, they have got
11 their helmets up. Nobody is wearing gas masks. It's the
12 insertion of the poles from their signs by Antifa into the
13 fence. They are hiding behind their signs, taking things out
14 of the backpacks and then their attempt to -- the perception of
15 the police at the time, the reasonable perception to breach the
16 fence at the moment the President is leaving the Civic Center,
17 that is what justifies it's PepperBall®, nothing to do with
18 terminating First Amendment rights, certainly an individualized
19 inquiry as to anybody impacted by this PAVA.

20 Let's continue to play.

21 (Video played.)

22 MR. ROSENBAUM: Observe the crowd to our right of the
23 big black sign. Do you see people choking, running away? No.
24 That smoke has not impacted them. What did happen is the
25 people with the black masks and the black signs mostly back

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1 off. Their backing off may have caused other people to move
2 out of the way but that had nothing to do with an effort by the
3 Phoenix police to stop the demonstration. Their intent was
4 just the opposite, allow it to continue.

03:31:39

5 And that appears to be working. Things keep being
6 thrown by the crowd. Police still don't have tear gas masks
7 on. They still have their shields up, their face shields up.

03:32:00

8 What changes everything is tear gas thrown at the
9 police from the crowd. That can't be allowed to happen for the
10 safety of the police, for the safety of the public.

03:32:25

11 Here we are a full minute later. Most of that crowd
12 is still standing there. They are not choking or running away
13 from the PAVA.

14 Do we win that liability question? I think so, hands
15 down. But it's an individualized question. Very different
16 than what happens to other individuals, proposed class members,
17 throughout the evening.

03:32:45

18 And this is what they say is the common issue that
19 allows certification, this event. Of course it doesn't.
20 That's their theory but it's not what the jury will be asked to
21 decide.

03:33:13

22 (Video continues to be played.)

23 MR. ROSENBAUM: That's what came in from the crowd
24 and then there's another canister later that we'll see. This
25 is after the canister. Boy, has that crowd thinned out a

03:33:53

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1 little bit more in that area. I suspect it's tear gas, the
2 blue smoke from the crowd.

03:33:58

3 This will show the other tear gas coming from the
4 crowd. This is the gray smoke that lands behind the police
5 officers who are now putting on their own tear gas masks.

03:34:20

6 There it is. And you see the masks going on and I assume we'll
7 see if -- this image, the first deployment of smoke. Here it
8 is. First police smoke. This thing gets kicked back at
9 police, a violent action by somebody in the crowd. Here it is.

10 You see they are not running away choking, tearing.
11 Clearly that's smoke and the same thing with that whitish-gray
12 grenade that's being thrown back to the police at the left. I
13 think --

03:35:07

14 Is that the end of that video?

15 So that's why the plaza was cleared. Nothing to do
16 with an unlawful assembly announcement. Let me just make clear
17 why an unlawful assembly announcement is a red heron. What
18 matters is the decision by the police to clear the area using
19 smoke, using PepperBall®, right, and what warnings may or may
20 not have been given that may be relevant. Nobody was arrested
21 for violating an unlawful assembly order.

03:35:32

03:35:57

22 You need the unlawful assembly order in order to make
23 mere presence a crime and arrest somebody, but police have full
24 authority to take action against violent protesters to clear
25 this area. And the record reflects that there were multiple

03:36:20

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1 warnings given in multiple ways. There was smoke. We've seen 03:36:27
2 how that worked. There were aerial flash bangs. That worked.
3 The helicopter comes over. You can see it in other videos, you
4 see the light shining shortly after this and you can hear on
5 some of the open source video the helicopter saying, "Leave the 03:36:44
6 area or you will be pepper sprayed."

7 So there are warnings. It's not until about 8:52
8 that an official unlawful assembly announcement is made from
9 the Chevy Tahoes. That doesn't matter. The question is, were
10 the officers' actions reasonable under the circumstances? Part 03:37:09
11 of that is what kind of warnings were given. Nobody was
12 arrested for violating the unlawful assembly order.

13 So we agree that at any given place and time what
14 warnings were given is an individualized fact issue. The
15 official unlawful assembly announcement is a heron. It has 03:37:28
16 nothing to do with these First Amendment and Fourth Amendment
17 claims.

18 What I would like to do now is show a portion from
19 Exhibit 53. Focus on it but in that first video, the
20 compilation video, the plaintiff, Ira Yedlin, is the man in the 03:37:52
21 blue who has the misfortune perhaps of standing next to Antifa.
22 Was that a reasonable use of force? This is not a negligence
23 case, right. This is a 1983 case. If somebody is even
24 negligently hit because of the proper action taken against
25 somebody else, that's not a 1983 claim, it's a negligence 03:38:17

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1 claim. But he then comes back to the fence and violently
2 shakes the fence all by himself and that's when he's actually
3 struck.

4 But that is an individualized question as to
5 Mr. Yedlin when he comes back at the fence, violently shakes it
6 in an attempt to open it according to one of the plaintiff's
7 own testimony, looking at the video, was it a reasonable use of
8 force under the circumstances with the President leaving the
9 Civic Center, with Antifa just having tried to breach the
10 fence, was that an appropriate use of force against him? We
11 think yes, but that's an individualized determination that
12 needs to be made.

13 So I want to show the video of plaintiff Guillen from
14 Exhibit 53 and the video you'll see is from this northwest
15 corner of Third and Monroe so she's over at Third. This is
16 about at 8:50 I believe, but well after the activities that are
17 down here. She has seen the smoke. She may or may not have
18 actually experienced some CS gas but she decides to stay and
19 she's taking videos.

20 She has the misfortune -- and by now the Phoenix PD
21 have crossed the pedestrian fencing to form their lines, they
22 are moving one line towards the east and then the other line
23 towards the west to meet up with a line that is then going to
24 go up Second Street to clear the area. But she has the
25 misfortune of standing next to an individual who had eventually

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1 tried to kickback some munitions at the police and they respond 03:40:10
2 in her direction with a muzzle blast, 40 millimeter muzzle
3 blast. What is a muzzle blast? It comes from a 40
4 millimeter -- we'll call it a shotgun but it's powder. There's
5 no impact, unlike some of the other impact munitions that you 03:40:30
6 read about from Officer Turiano. It's just powder. It's like
7 getting sprayed with pepper spray.

8 So let's look at that video.

9 (Video played.)

10 MR. ROSENBAUM: She's in this area. The toll -- I 03:40:58
11 don't know if you saw that muzzle blast. There she is walking
12 away with the taller gentleman in the blue who was her friend
13 who came with her. In her deposition she says she had to be
14 carried away. She claims she has a big welt from that, which
15 is simply not possible, but those are fact issues with respect 03:41:16
16 to damages.

17 But with respect to that deployment, she's still
18 there at 15, 20 minutes after most people have the good sense
19 to leave. She has the misfortune of standing next to a
20 wrongdoer. The officer who fired that muzzle blast to deal 03:41:36
21 with that wrongdoer, was that a reasonable use of force under
22 the totality of the circumstances? We think plainly yes,
23 particularly at this time people know the police have crossed
24 the line. It's time to leave. Clearly an individualized
25 question as to liability and as to damages. 03:41:59

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1 Next we have two videos that focus on -- and if Your
2 Honor wants to relook at that again, I know it happens real
3 fast. I can replay it.

03:42:09

4 THE COURT: No. I remember it from previous. Go
5 ahead.

03:42:20

6 MR. ROSENBAUM: So plaintiff Travis is impacted by
7 munitions at about 9:06 over here north of Monroe and on Second
8 Street. Some of the video you can see is from what I still
9 call the Chase Bank parking garage. What is it? I still call
10 it the Valley Bank parking garage but that's the Chase parking
11 garage.

03:42:49

12 As the testimony we cited shows, by this point in
13 time, Ms. Travis has heard the helicopters saying, "Leave or
14 you'll be pepper sprayed." She's right by the Chevy Tahoe that
15 is announcing it's unlawful assembly, that she has heard all of
16 that. Of course she's seeing smoke, tear gas, flash bangs, and
17 this is the point in time where the TRU line starts advancing
18 up Second Street. She is somebody who could have been arrested
19 for violating the unlawful assembly declaration. She had heard
20 it. It had been given. That was not the intent of the police,
21 to be mass arresting people. This is not a mass arrest case
22 unlike some of the cases plaintiffs rely on. It's the
23 opposite. It was a decision to clear the area and to the
24 extent possible, not arrest people.

03:43:13

03:43:40

25 So her testimony is, "Why did you stay? The police

03:44:08

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1 line is advancing towards you."

03:44:10

2 "I wanted a good picture."

3 Okay. So nothing wrong with that I suppose. She
4 later said maybe she should have made a different decision. It
5 may have been an unfortunate foolish decision but was the
6 deployment of force after all of those warnings where she's
7 stationary and the Phoenix police are advancing, was that
8 reasonable under the totality of the circumstances? That has
9 nothing to do with the PepperBall®ing of Antifa a half an hour
10 earlier.

03:44:24

03:44:46

11 So there are actually two videos. You can see two
12 aspects of this from different perspectives.

13 (Video played.)

14 MR. ROSENBAUM: That's her. It looks like a scroll
15 but it's a turtle. She's just got -- she's still there.

03:45:09

16 THE REPORTER: Excuse me. I can't hear you with that
17 running.

18 MR. ROSENBAUM: You saw the first muzzle blast goes
19 past her apparently, not aimed at her, and she doesn't even
20 notice it. She continues to stand there with the line
21 advancing and then appears to be hit by a second muzzle blast.
22 What we'll see in the next video is that causes her to fall.

03:45:32

23 People rush towards her and one of the officers uses pepper
24 spray towards the people who are rushing towards here, right.

25 Fact question, why did they use pepper spray at that time? One 03:45:59

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1 of the individuals you'll see is a gentleman named Josh Cobin 03:46:03
2 who later is hit with an impact round and I'll show you that if
3 you have time. But let's play this video.

4 (Video played.)

5 MR. ROSENBAUM: That's Mr. Cobin who, over the course 03:46:30
6 of the evening, had been throwing things at police. He's got
7 his own gas mask. He came to this party with his own gas mask.
8 Why is he still there? Why are other people still there this
9 late in the evening after hearing the unlawful assembly
10 announcements? Maybe some of them are curious. Maybe some of 03:46:50
11 them are in the media. Maybe some of them are wearing tear gas
12 masks because they want to throw things back at police. But
13 those munitions that impacted Ms. Travis, a jury has to decide
14 whether the individual who fired either the muzzle shot or who
15 used the pepper spray, whether these actions were reasonable 03:47:16
16 under the totality of the circumstances.

17 The last example I want to show, and then I think I'm
18 done with video, is, in fact, that same Josh Cobin. This is
19 defendants' Exhibit 50.

20 (Video played.) 03:47:33

21 MR. ROSENBAUM: Okay. That's Mr. Cobin. You read
22 about that in the excerpts from Mr.-- Officer Turiano's
23 deposition. He took that shot. It was in the lower abdomen
24 and he asked if it was in the private parts. It wasn't and
25 that's confirmed later. But was that a reasonable use of 03:48:12

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1 force. He's a proposed class member presumably and others like 03:48:15
2 him.

3 You read Officer Turiano talk about each of his
4 deployments of impact of munitions. It wasn't a rubber bullet.
5 It was a 40 millimeter either a foam round or OC round. I 03:48:30
6 forget which.

7 THE COURT: So, Mr. Rosenbaum, at least with regard
8 to Mr. Cobin, I take it your point is that he is exemplary of a
9 situation where the finder of fact must individually consider
10 liability questions? 03:48:50

11 MR. ROSENBAUM: Well, yes. It's really -- this is
12 plaintiffs' whack-a-mole game. And I mean that in a friendly,
13 not terribly sarcastic way. So they define the class, the two
14 subclasses for damages as persons who were present, subjected
15 to use of gas, pepper spray, bullets, et cetera, and who did 03:49:14
16 not engage in any conduct justifying such use of force against
17 them.

18 Well, as we cite in the *Lyall* case and others, that
19 is an invalid class definition because in order to determine
20 mere membership in the class, one needs to make an 03:49:36
21 individualized determination.

22 So why I suggest did they put it in the class
23 definition? Because if it's not in the class definition, then
24 that's built into the liability determination that
25 predominates, that predominates. And that's what the *Moss* case 03:49:54

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1 says with respect to individualized damages, the *Lyall* case,
2 the *Universal Calvary Church* case.

3 In a case like this with individual actions taken
4 over a course of time by different officers exercising their
5 own judgment, the question is with respect to each of those
6 impacts, was that use of force, based on the totality of
7 circumstances at that time by that decision-maker, was that a
8 reasonable use of force? If not, it's not a 1983 violation,
9 before you even get to damages.

10 So the briefs talk about the damage problem, and
11 that's another reason that a class shouldn't be certified, but
12 we don't even get there because on the liability questions,
13 individualized issues predominate.

14 So the *Moss* case, President Bush, 2004 goes to
15 Jacksonville, Oregon. He's dining at a restaurant. The
16 protesters find out where he's dining and they go there. And
17 the protesters were encircled by the police and arrested all at
18 once. The Court in *Moss* determined, well, that's a common
19 issue. Everybody was treated the same. Every member of the
20 class was surrounded at once and arrested.

21 But in some instances, this is a quote, officers were
22 violent striking some individuals with clubs, firing pepper
23 spray bullets at them. I don't know what a pepper spray bullet
24 is. I assume it's a PepperBall®. And so the Court denied
25 certification of the excessive force claims because, and I'll

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1 quote again, it would require individualized determinations 03:51:54
2 into both the extent of the force used against each individual,
3 the reason why each officer decided to use said force which
4 predominate over any common issues shared by the class.

5 Plaintiffs effort to avoid what has clearly, just 03:52:12
6 from these handful of examples, an individualized question with
7 respect to every use of force is to propose their untenable
8 theory that in a sense, none of this would have happened had
9 there been a mass arrest of Antifa.

10 THE COURT: So let me follow up with a line of 03:52:38
11 questioning that I started with Mr. Litt. Let's move out of
12 the context of excessive force and move to the context of the
13 First Amendment, the interference with the right of speech.

14 The Court -- I see the consideration of the elements
15 of that offense to be far less concerned with individual 03:53:08
16 deployments of force, whether it's PepperBalls® or smoke or gas
17 or anything else. There it is did the action interfere with
18 somebody's right to speech and what was the intention of the
19 action when it was taken.

20 MR. ROSENBAUM: Actually, plaintiffs disagree in the 03:53:37
21 joint proposed case management plan. This is page eight. We
22 all agree that the proof of First Amendment claim, this is what
23 the jury will be asked. Plaintiffs were engaged in protected
24 speech, element one. Well, that may or may not have been true
25 for some of the class members. Where was Antifa engaged in 03:53:55

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1 protective speech? Was Mr. Yedlin when he was shaking the
2 fence. Two, officers took action against the plaintiffs that
3 deterred their speech that would chill the speech of a person
4 of ordinary firmness. Is that what happened with the
5 deployment of PepperBall®? Is that what happened with
6 deployment of smoke?

03:53:59

03:54:13

7 But the third is I think the most individualized
8 where you have to look at each and every event and that is that
9 such deterrence was a substantial or motivating factor in the
10 officers' conduct.

03:54:30

11 Well, the undisputed testimony is with respect to the
12 deployment of PepperBall® against Antifa, in fact, the motive
13 was exactly the opposite. Exactly the opposite. It was to
14 allow the rest of the demonstrators to continue to enjoy their
15 First Amendment rights, as the police had been protecting that
16 right over the course of the entire day.

03:54:55

17 THE COURT: Well, maybe, right. This is to be
18 determined by a finder of fact. But your point here is that
19 decision has to be decided separately from the decision, the
20 intent behind the next deployment and the next deployment. Is
21 that it?

03:55:10

22 MR. ROSENBAUM: Well, that plus it's plaintiffs'
23 burden now to show that at least there's some evidence
24 supporting that theory where all of the evidence shows exactly
25 the opposite; right? And we see it all in the video; right?

03:55:26

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1 After the deployment of PepperBall® --

03:55:30

2 THE COURT: But I don't need to decide that now.
3 That's the merits. I just need to figure out is there a
4 commonality between cause and effect here with regard to First
5 Amendment.

03:55:43

6 MR. ROSENBAUM: Right. And then the next deployment
7 of smoke where we say the effect on people over at Third Street
8 going up, Third Street, was the motivation for that to deter
9 the First Amendment rights of the people who were leaving or
10 was to it stop the onslaught of chemical agents and objects
11 from the crowd right in front of the police?

03:56:06

12 THE COURT: So what is wrong with the Court looking
13 at this as in the collective? In other words, all of these
14 things together eventually, eventually resulted in the block,
15 the free speech area being cleared?

03:56:21

16 MR. ROSENBAUM: Because that's not what the jury
17 needs to be asked and that is the same as my weather
18 hypothetical. Had a violent thunderstorm come, none of this
19 would have happened. The crowd would have thinned for
20 independent reasons.

03:56:37

21 Every use of force, whether in the First Amendment
22 context or the Fourth Amendment context, has to be evaluated
23 individually; and as we've seen from videos, the composition of
24 the class changes place by place, time by time.

25 So let's say some class members decided it's time to

03:57:01

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1 go, I'm leaving, as soon as they saw the PepperBall®. Their 03:57:04
2 First Amendment claims are different than somebody who didn't
3 see that; right? They are reacting to a response by the police
4 not to stop First Amendment expression but to stop violence by
5 Antifa at the fence. 03:57:25

6 What about the people that then decide to leave on
7 Third Street when they see the smoke; right? That's a
8 different group. Not everybody got encircled and arrested,
9 right. It's not a mass arrest case. That's a different group.
10 They are responding to one the deployment of yellow smoke 03:57:42
11 designed to deal with the immediate threat to the crowd and the
12 police officers on Monroe closer to second. Their First
13 Amendment argument is different than, let's say, Ms. Travis who
14 stayed and protested even up until the time that the police
15 officers were lined up and marching towards her. 03:58:09

16 So that didn't deter her speech until she is hit with
17 munitions and we talked about the fact issues there.

18 So this was an ever-evolving scene, very different
19 than the *MIWON* case. The *MIWON* case was based on an
20 uncontested finding by the Court. Apparently plaintiffs did 03:58:33
21 not contest that everything was a command level decision to
22 clear the park and then they were arrested and it's an arrest
23 case which has, as plaintiffs concede, has this unfortunate
24 class definition that builds into it the individualized fact
25 question that apparently was never contested by the parties, 03:59:06

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1 but that the *Lyall* Court, a couple of years later in the same
2 district of California said: No, no, you can't do that. You
3 can't do that.

4 THE COURT: Mr. Rosenbaum, I'm going to ask you a
5 question.

6 And, Mr. Litt, I'm going to ask you to answer the
7 same when you get up on rebuttal.

8 Because as I was reading all of the briefing, and now
9 hearing your arguments both again today, although I can't quite
10 put my finger on it, it strikes me -- well, I would like to
11 know both of your positions as to whether there is something
12 qualitative about the difference between arrests as opposed to
13 deployment of dispersal mechanisms that would make irrelevant
14 or not on point the arrest cases in the situation of the
15 dispersal -- pure dispersal case.

16 MR. ROSENBAUM: Well, Your Honor, I think the *Moss*
17 case answers that because it had both and certified as to the
18 mass arrest. But what happened there, similar to what happened
19 in *MIWON*, the May Day riots, was encirclement of the entire
20 crowd. Every member of the class gets arrested. They all
21 suffer the same injury from presumably the same alleged
22 wrongful act. That didn't happen here.

23 And as we've seen, the deployment of chemical agents
24 were very specific to a time and place. PepperBall®, yes, it's
25 a chemical agent. But very different than the deployment of

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1 pepper spray directed at one individual as we saw or at least
2 the crowd of three individuals as we saw with Ms. Travis. That
3 is not impacting the other probably hundred people that were
4 still -- 50 to 100 people that were still left on the street.
5 That's not causing them to leave. It's different than smoke.
6 It's different than tear gas. And they quote from our expert,
7 Michael Hillman, who was the author of the May Day report and
8 was highly critical of the Los Angeles Police Department and he
9 says, yes, tear gas is indiscriminate but that he was very
10 clear. The deployment of tear gas isn't and wasn't here and he
11 contrasted the May Day events with what he concluded was a very
12 thoughtful and successful operation by City of Phoenix.

04:00:49

04:01:05

04:01:28

13 THE COURT: I'm not sure I captured the point behind
14 the question I asked you before.

15 If you go to the model rules for the Ninth Circuit
16 and the section that pertains to 1983 actions and in particular
17 those 1983 actions dealing with excessive force, you'll find
18 that there is a different instruction for arrest as opposed to
19 a violent act or a physical act against somebody. There's a
20 reason for that. I'm trying to put my finger on that or the
21 need for the two instructions or the need for that difference
22 pertains here.

04:01:52

04:02:18

23 MR. ROSENBAUM: Whether an arrest is lawful or not
24 depends on completely different factors than the use of force
25 was --

04:02:34

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1 THE COURT: Which gets me back to -- maybe I close
2 the loop this way. Do the arrest cases apply here?

04:02:35

3 MR. ROSENBAUM: We think they don't or they do as a
4 distinction. Again, *Moss* it's a hybrid. Proves the point. A
5 mass arrest is a unified event, presumably a unified decision
6 that everybody here protesting in this area or everybody who is
7 in this church or everybody who is here is going to be
8 arrested, was arrested.

04:02:56

9 THE COURT: Isn't that because precisely or almost
10 precisely the same thing happens to all of them? They are all
11 arrested. No more, no less with regard to that analysis.

04:03:14

12 MR. ROSENBAUM: Exactly. And some of those cases
13 also contained elements of wrongful detention, how long, you
14 know, were you detained. So some of the so-called nominal
15 damages cases involve can you put a dollar value on a day or an
16 hour in detention? It's measurable. Any distinctions there
17 are sort of actively measurable by time. That is not the case
18 here.

04:03:36

19 I can talk about damages for a moment if Your Honor
20 will hear me on it, if you had more questions on predominance.

04:04:04

21 Again, I don't think we get to damages because
22 individualized issues predominate with respect to liability.

23 But the *Chua* case that they rely on was a mass arrest
24 case. *Chua* against the City of Los Angeles is just two years
25 old. The Court denied a class on damages. The plaintiffs

04:04:30

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1 there argued that even though it was a mass arrest case, you
2 can award general damages to everybody. And the *Chua* court
3 said no, it's the Supreme Court's decision in *Comcast*. It's
4 the burden of the plaintiff at the class certification stage to
5 articulate what those damages would be to articulate a
6 methodology. They haven't done that.

7 But let me explain what's really going on and I think
8 why class certification in a case like this where individual
9 circumstances vary so differently. Somebody like Cobin hit
10 with an impact munition, somebody like plaintiff Travis who is
11 hit by a muzzle blast and then pepper spray. If there's
12 liability, presumably her damages are very different than
13 somebody who went up Third Street and may have felt some unease
14 because they saw yellow smoke.

15 What the Supreme Court said in the *Stachura* case,
16 which they cite, was nominal damages for First Amendment
17 violations are available but they are not in addition to. They
18 may not supplement compensatory damages. You can't get both.
19 *Stachura* was an individual case. They cite about a half a
20 dozen cases on page 34 about the availability of nominal
21 damages. Those are all individual cases. This is not an
22 individual case.

23 But what *Stachura* tells us is if Your Honor were to
24 certify a class for nominal or general damages, it wipes out
25 the right of somebody like Mr. Cobin, who is hit with an impact

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1 munition, who if he could prove liability, has damages very
2 different than somebody who was just walking up Third Street.
3 Maybe they got a whiff of CS gas. If they had an individual
4 case, perhaps a Court would say nominal damages are
5 appropriate. *Stachura* said when you measure nominal damages,
6 it can't be based on the abstract value of the First Amendment
7 right.

04:06:42

04:06:58

8 So the Court reversed, remanded because damages were
9 both overlapping. There was general and nominal. But the
10 instructions on how to calculate nominal damages were wrong.

04:07:17

11 So what that suggests is even the nominal damage
12 calculation needs to be individualized. You're wiping out this
13 person's right to receive general damages. And if you're going
14 to come up with some arbitrary number that applies class-wide,
15 that doesn't fairly reflect what happened here. So we think
16 it's inappropriate to certify any of these excessive force
17 classes because on liability, individual issues predominate but
18 also because there's no appropriate and fair method of
19 assessing damages and plaintiffs failed their burden under
20 *Comcast* to present to the Court what that method would be.

04:07:41

04:08:10

21 Can I talk about numerosity for a second because I
22 know I've probably gone longer than I should have?

23 THE COURT: Go ahead.

24 MR. ROSENBAUM: Again, we're just challenging
25 numerosity with respect to the proposed Subclass B, which is

04:08:28

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1 those who were hit with impact munitions. So forget about the
2 deployment of 500 PepperBalls® mostly into the ground. That
3 doesn't tell us anything about how many people would be in the
4 class. So we have Mr. Peard's declaration and of course
5 plaintiffs concede, as they must, that 40 is generally the
6 threshold, sometimes you can go as low as 20, and maybe there
7 has been an outlier in the history of Rule 23 that has gone
8 lower than 20. But Peard counts 21. Only 11 of those come
9 from anything that's in the record from declarations.

10 Two of those 11 -- I looked at them all -- they are
11 actually pepper spray, not impact munition, so I think pepper
12 spray people are part of that subclass, too, but -- so that's
13 11. Then you have 18 people who said they saw somebody else
14 getting hit. We have no reason to think that that's anybody
15 other than those 11, right? And then we have Mr. Turiano's
16 deposition testimony where he describes instant by instant each
17 deployment of munitions that -- at least each deployment that
18 he was asked about. And in every one of those deployments, the
19 individual who was struck was engaged in unlawful conduct, was
20 throwing something back at Phoenix police.

21 Those people are not part of the proposed class
22 because the proposed class is those whose conduct did not
23 justify the use of force. So whether it's 11 or 21, that's the
24 outer range; but then you have to reduce it by the evidence in
25 the case that a substantial number of those, if not all, are

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1 outside the class, because their conduct, in fact, justified
2 the use of force. So we think not only on predominance grounds
3 but on numerosity grounds that impact class should be denied.

4 The briefs talk about a failsafe class. I think it's
5 a nonissue. The law is clear. The *Lyall* case says so, that
6 what you can't have is a class definition that builds into it
7 the same individualized issue that, if you didn't have a
8 failsafe class, would preclude certification in the first
9 place.

10 They cite the *Melgar* case. It doesn't hold what they
11 say at all. I don't know if Your Honor read it.

12 Can we turn on the document camera?

13 So this is it. It's a one-page mem op unpublished,
14 says right at the bottom this position is not appropriate for
15 publication and it is not precedent except as provided in
16 Circuit Rule 36.3. A great panel; right? It has got Canby,
17 Hurwitz and a visiting judge. But the pertinent part, it says:
18 Nor did the District Court abuse its discretion by certifying a
19 failsafe class. What it goes on to say is, that's because this
20 wasn't a failsafe class.

21 The next sentence reads: A failsafe class is
22 commonly defined as limiting membership to plaintiffs described
23 by their theory of liability in the class definition such that
24 is the definition presupposes success on the merits. Here the
25 class definition did not presuppose its success.

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1 So they weren't approving a failsafe class. They
2 were saying, this isn't one. And then the line that plaintiffs
3 rely on in this not-for-publication mem op is the next one
4 where they build in a typo. Maybe it was a typo. I don't
5 know.

04:12:34

04:12:50

6 We further note, though, that we do not hold that our
7 circuit's case law appears to disapprove of the premise that a
8 class can be failsafe. They say the Ninth Circuit meant to say
9 "appears not to disapprove."

10 Well, it seems to me in light of *Lyall* and the other
11 cases, it's a pretty thin read to stand on a one-page mem op
12 that's not precedent that says this is not a failsafe class and
13 that holds what plaintiffs want it to hold only by adding the
14 word "not" to.

04:13:02

15 So leave aside the kerfuffle over failsafe. The
16 problem here is the ritualized issue predominates, either at
17 the class membership stage if you accept their class
18 definition, or if you take that out, this is the whack-a-mole
19 to include people whose conduct was unlawful, then it's part of
20 the liability phase at trial that has to be decided anyway.

04:13:32

04:13:56

21 I haven't said anything about injunctive relief.
22 Maybe I incorrectly took some comfort from Your Honor's
23 questions of Mr. Litt. But I want to talk about the
24 *Hodgers-Durgin* case for a minute because it hits on the
25 declaration question that Your Honor asked Mr. Litt. So

04:14:21

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1 *Hodgers-Durkin, en banc*, Ninth Circuit case, affirming Judge
2 Roll from Tucson where he declined to certify a class of
3 persons who were improperly stopped by the Border Patrol. And
4 Judge Roll held, and the Ninth Circuit affirmed, that the named
5 plaintiffs didn't meet their burden under *Lyons* to show
6 substantial and immediate irreparable harm. This is not likely
7 to occur to them again.

04:14:23

04:14:53

8 But the plaintiffs had declarations from other
9 individuals just like we have here who allegedly were stopped
10 many more times than the named plaintiffs. And the Ninth
11 Circuit held that at the class certification stage,
12 declarations from unnamed absent class members, unnamed in the
13 sense that they are not named in the complaint, are
14 inappropriate for consideration.

04:15:16

15 So I think you can ignore those declarations. All
16 that -- and I agree if you were to look at them, they don't
17 carry much weight. They certainly don't satisfy plaintiffs'
18 burden under *Dukes* of the class certification stage. They
19 don't survive the rigorous analysis that the Court should
20 subject them to.

04:15:40

04:15:57

21 So what do we know about the likelihood of this
22 happening again? Is there going to be -- this was an
23 incredibly unique event. We know this. It's in the briefs,
24 but the country was at knife's edge. Ten days earlier in
25 Charlottesville a White Nationalist plowed his car into a

04:16:23

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1 peaceful crowd and killed somebody.

04:16:31

2 The President then said there were good people on
3 both sides, inflaming not just his opponents but many of his
4 strong supporters, and then it's announced that he's coming to
5 Phoenix for a campaign-style event. And it's reported in the
6 papers that he's considering pardoning Sheriff Joe Arpaio who
7 had recently been convicted in this very courthouse. And then
8 it turns out the Vice President is coming and Cabinet level
9 officials. So the opportunity for an explosion was here.

04:16:50

10 Phoenix PD planned incredibly well. Up until the
11 Antifa approach to the fence there had been no serious
12 injuries, no mass arrests, no property damage. There were
13 confrontations between members of the crowd that the police
14 managed to calm down. And even after, even after the events of
15 later in the evening, there were no mass arrests, there was no
16 serious injury. There was no property damage. Everybody went
17 home with life and limb intact.

04:17:22

04:17:54

18 So I'm not asking the Court to opine today on whether
19 this was the success that the Phoenix Police Department and the
20 City feel it was but just to point out how unique this event
21 was.

04:18:17

22 I don't know what kind of injunction they would want,
23 to have a Court official stand by a pedestrian fencing the next
24 time there's a Presidential visit. But the point is, if you
25 look at the record of what Phoenix PD had done in the past and

04:18:38

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1 has done since, it doesn't meet the test of *Lyons* and
2 *Hodgers-Durkin* that there's a likelihood of substantial and
3 immediate irreparable injury. CS gas, Lieutenant Moore's
4 declaration establishes, has been used just once prior and that
5 was to keep I-10 open during the Black Lives Matter protest.
6 Your Honor might remember the attempt to block I-10 freeway
7 creating a serious risk but entirely different event.

8 And then since the Trump rally of 2017 Phoenix police
9 have been involved in over 50 mass demonstrations and protests
10 including the Red for Ed marches which Your Honor I'm sure is
11 aware of that were larger in magnitude and duration than this
12 and did not deploy a tactical chemical agent at any one of
13 them.

14 And of course the record shows that the Phoenix
15 police have made some improvements since this event including
16 purchasing a larger LRAD than the one that they had.

17 Ironically, over the opposition at City Council by
18 some of the same plaintiffs who say the LRAD could be used as a
19 weapon, it's too loud. But maybe that will be another lawsuit
20 some day.

21 But there's nothing in this record showing that
22 there's any likelihood of repetition. So there's no standing,
23 no standing, period, in the case. Now, we haven't brought a
24 summary judgment on that issue yet but at the class
25 certification stage, it's their burden to show that the point

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1 Your Honor asked earlier, even if there's standing -- we don't
2 think there is -- there's no injunction that this Court might
3 issue, even if it's staging a federal court official at police
4 barricades from now on, that is not available to be awarded to
5 the named plaintiffs. There's no reason to certify the class.

04:20:37

04:20:56

6 And there is harm to certifying a class. The mere
7 administrative burden and cost. And I can't imagine we're not
8 arguing what any injunction should say but a class-wide
9 injunction of everybody on earth whoever in the future might
10 protest anything, not just a Presidential visit in the City of
11 Phoenix, it would be bad enough to have an injunction like that
12 issued on behalf of the named plaintiffs but on behalf of a
13 class of presumably millions of unknown people, not
14 appropriate. I don't know how you give Class notice to such a
15 class.

04:21:20

04:21:38

16 I think that's all I had, Your Honor.

17 Do you have any further questions for me?

18 THE COURT: I do have one at least, Mr. Rosenbaum,
19 and it's a question that I asked Mr. Litt earlier and I
20 intended to get your view on as well and that was, what does
21 the Court do if it determines that the requirements are met for
22 class certification under the analysis of one or more claims
23 but not other claim or claims?

04:21:57

24 Mr. Litt responded that that doesn't matter, that
25 once the certification has been met for one, it's met and that

04:22:18

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1 is how it goes forward. I want to know, number one, if you
2 agree with that; number two, if you have any case law to
3 support your agreement or disagreements; and number three, if
4 that is true, mechanically how, then, would it work?

5 MR. ROSENBAUM: I think Your Honor may certify
6 classes for only those claims that meet the standards of Rule
7 23, and our briefs are full of cases showing exactly that,
8 where courts have carved a proposed class eliminating, for
9 example, in *Moss* the excessive force claims.

10 In the *Augustin* case that they rely on the Court
11 denied a class for special damages.

12 So, I mean, it seems to me the answer to the question
13 is obvious. We didn't specifically brief it in that sense; the
14 standards of Rule 23 apply to each claim. We don't think any
15 of them are certifiable; but just because they have asked for
16 an injunctive relief class that includes every person living
17 and breathing on the earth doesn't mean that you should certify
18 that class even if you think that the class should be certified
19 for impact emissions. Your Honor pointed out something that
20 was in my outline but for lack of time I didn't get to it,
21 which is the reason they named the individual defendants is
22 because they understand that's the burden of proof at trial.
23 And it really, I think, sheds a light on what's really going on
24 with their proposed theory of the case that rests on common
25 issues. This is not a common issue -- a common issue case, so

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1 I don't know what Your Honor has in mind in terms of
2 potentially certifying a narrow trimmed-down class. But I
3 think if Your Honor doesn't deny the motion entirely, Your
4 Honor should deny as much of it as Your Honor believes should
5 satisfy Rule 23.

04:24:21

04:24:43

6 THE COURT: I think that's all the questions that I
7 had for you now, Mr. Rosenbaum. Thank you.

8 All right. If anybody has a cell phone, I think my
9 staff might have heard it, please turn it off now.

10 And Mr. Litt, whenever you're ready, sir.

04:25:09

11 MR. LITT: All right. I will attempt to get through
12 these quickly. I just want to make sure that the question that
13 you had asked I have right which is, is there a qualitative
14 distinction between certifying an arrest case and a dispersal
15 class. Do I have that right?

04:25:37

16 THE COURT: Yes.

17 MR. LITT: So I think the answer is, obviously, they
18 are different in certain respects but the fundamental issue,
19 there's no qualitative distinction which is, does it meet the
20 criteria of Rule 23?

04:25:55

21 And our contention is that with respect to both
22 Fourth and the First Amendment claims, we do for reasons that
23 we already discussed.

24 I do want to spend a minute on some of the cases that
25 the defendants appear to rely on that they cited in response to

04:26:14

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1 this question. So they relied on *Moss* but they really
2 misconstrue *Moss*.

04:26:19

3 So it's important to understand exactly what *Moss* did
4 and didn't do. *Moss* found that there was no centralized
5 command decision about force and because of that, the use of
6 force was not a common issue.

04:26:39

7 Here it is undisputed that the decisions that we're
8 challenging, both the decision to use the PepperBalls®, the
9 decision to use the tear gas were command force decisions and
10 were ratified subsequently if not at the time by Chief
11 Williams.

04:27:04

12 The *MIWON* case -- and so *Moss* adopts the *MIWON* case.
13 *Moss* totally embraces the *MIWON* case but says that our
14 circumstances here are different in *Moss*, but the point is that
15 our circumstances here are exactly what *MIWON* described.

04:27:27

16 And then Mr. Rosenbaum indicated that the *MIWON* case
17 was an arrest case. I was one of the lawyers in the *MIWON* case
18 and it was the last thing from an arrest case. It was
19 described in the press as an LAPD police riot because what
20 happened was the police literally attacked the crowd with no
21 warning and chased people through the crowd, hit people,
22 including press. If there were any arrests, they were a
23 handful.

04:27:51

24 The certification from Judge Matts was that was --
25 that was the central claim by far in the case and that's what

04:28:14

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1 it certified.

04:28:20

2 The *Chua* case, in which I was also counsel, and the
3 case is in the process of being settled for a class. So where
4 Mr. Rosenbaum gets that there was no class determination in
5 favor of plaintiffs I'm not quite sure.

04:28:34

6 What did happen was that there were two classes in
7 that case and there was a small class that was detained for a
8 while and the Court found that the proposed class
9 representative was not adequate because he was a legal observer
10 and so he wasn't typical. And we ended up not redoing that.
11 But the other class, the downtown class, so it was an arrest
12 class in that case. But the *MIWON* case is very clearly not.
13 And the *Moss*, case although it doesn't certify, makes very
14 clear that it would certify if you had centralized command
15 decisions, which is exactly what we have here.

04:28:53

04:29:19

16 Mr. Rosenbaum spent a lot of time arguing what I
17 think are more the merits but there's some insight there
18 because he basically organizes that the initial use of force is
19 justified and talks about all of these things being justified.
20 He didn't really say that they weren't acts against the crowd.
21 He just tacked on, well, these are individual use-of-force
22 issues but they are at least -- and under the evidence that
23 we've presented, the whole point is that they weren't, that the
24 use of PepperBalls® was not justified.

04:29:47

25 Now, there's a common question there and there's a

04:30:13

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1 common answer. Mr. Rosenbaum gets to argue that it was
2 justified. That's not the issue for class certification. The
3 issue for class certification is, is that a common question?
4 It is.

5 The same thing with respect to the tear gas about
6 three minutes later which is that they claim, well, one or
7 maybe two individuals threw tear gas or some kind of gas at the
8 police. The videos don't show it impacting any of the police
9 but I can't answer for certain whether there's evidence I'm not
10 aware of. But, again, the question is, was that -- is that the
11 legitimate basis to send tear gas into a crowd of thousands?
12 These are common issues. And Mr. Rosenbaum's own description
13 going through it shows that they are common issues because,
14 really, he just asked the common questions and then said but
15 it's individualized.

16 Mr. Rosenbaum talked about mass accidents. So mass
17 accidents and the case law about mass accidents generally not
18 being suitable for class determination are just that,
19 accidents.

20 Civil rights cases involving a centralized decision
21 or a centralized policy or a failure to have a policy are all
22 classic situations in which classes are routinely certified.
23 Classes are certified in jails for failure to have policies
24 regarding certain conditions or allowing certain conditions.
25 They are certified for strip searches. They are certified for

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1 protest cases, both First Amendment and arrest.

04:32:25

2 So this is not a mass accident case. The reason that
3 mass accidents are not generally considered appropriate for
4 class certification is because they are accidents and so they
5 can be individualized, although there are exceptions, but
6 generally mass accidents are not considered suitable.

04:32:46

7 But things that flow in the 1983 context, things that
8 flow from a centralized decision-making process to act against
9 a group of people is your paradigmatic class 1983 claim. And
10 it happens in all kinds of contexts. And the individual claim
11 is not really the driving consideration. The driving
12 consideration is whether or not you've got the centralized
13 determination or policy or other things that makes there be a
14 common issue for resolution.

04:33:12

15 I want to talk about intent for a moment. Now, I
16 will say I'm not up to date on what agreements were reached
17 about certain language in some of the documents that
18 Mr. Rosenbaum was talking about. What I will say is a
19 use-of-force claim does not require any intent other than the
20 intent to do the act; that it wasn't accidental. There's no
21 claim here that it was accidental. The same is true for the
22 First Amendment. The issue is, was the conduct intentional
23 conduct? Did it interfere with peoples' First Amendment
24 rights? The question of whether or not they were intending to
25 interfere with First Amendment rights is really not a component

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04:34:29

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1 of the claim.

04:34:33

2 So under the facts that we've presented which,
3 obviously, the Court doesn't resolve at this stage, there was
4 interference. Then Mr. Rosenbaum spent some time saying, well,
5 they gave notice by using force. They gave a dispersal notice
6 by using force. I have never heard of anybody, and I am
7 familiar with no case that has ever said that it is an
8 appropriate dispersal order to use force to let people know you
9 shouldn't be there. That's just -- and the *Jones* case has it
10 exactly the opposite. You can't do that. You can't use force,
11 unless it -- unless it basically meets the clear and present
12 danger test. That's what *Jones* case says.

04:34:51

04:35:17

13 So on the numerosity just for a moment, I believe --
14 I think I'm quoting this right, that in the after-action
15 report, PPD itself said there were too many people shot to
16 count. So there's -- there's -- there appears to be some
17 indication that the PPD thinks it was a fair number of people.

04:36:07

18 On the class definition, I just wanted to make clear
19 that it is true that -- because I might not have answered the
20 Court's question the way I intended it. It's true that a Court
21 can find that certain claims don't meet the standard for class
22 certification. Other claims do. That's different from the
23 class definition. The class definition is objective describing
24 people but then there still could be a question like in *Moss*
25 that the class definition would include certain kinds of claims

04:36:35

04:36:55

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1 and not other kinds of claims.

04:37:01

2 Our point here is that the class definition that we
3 proposed is an objective one leaving aside sort of the disputes
4 over engaged in justified conduct or not and it would apply to
5 both. I didn't mean to imply by that that the Court wouldn't
6 have the discretion to say I don't think, as in *Moss*, that
7 you've met the standard for certifying an excessive force
8 claim. It's just that we have met the standard here. But --

04:37:17

9 THE COURT: All right. I appreciate the
10 clarification. I follow you now.

04:37:37

11 MR. LITT: So -- and then on injunctive relief, I
12 guess the thing that I would emphasize, one is there's a whole
13 issue of lack of policies, which the PPD itself identified and
14 then just said -- they called them something like room for
15 improvement or something like that. The use of tear gas, the
16 rules of engagement, how and when to use munitions, so there
17 are a whole series of things that injunctive relief would
18 clearly target as a remedy. I do want to mention that the
19 defendants ignore the policy component. The defendants like
20 jump to this issue of how strong a pattern have you proven. So
21 I just want to emphasize we do claim that we've established
22 enough for that but that's -- but really the central basis is
23 that the Phoenix Police Department has said what they did was
24 fine and this was an appropriate way to act. That, under
25 *Lyons*, is sufficient. You don't need anything more than that.

04:38:02

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04:38:59

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1 If you have policy and you have people who are going to engage
2 in conduct at whom that policy is aimed, you've met the
3 standard under *Lyons*.

04:39:03

4 I don't know if I've covered everything but unless
5 the Court has a question, I will stop.

04:39:21

6 THE COURT: Give me one moment just to make sure.

7 I do not have any other questions for either counsel.
8 Thank you, both. The Court will take the matter under
9 advisement and I will render a ruling as soon as I possibly
10 can. If I could see both Mr. Litt and Mr. Rosenbaum at
11 sidebar. We're adjourned.

04:40:23

12 Good day to everyone. And I'll be staying in the
13 courtroom for a while so please feel free to move about the
14 well.

15 (Whereupon, these proceedings recessed at 4:40 p.m.)

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C E R T I F I C A T E

I, ELAINE M. CROPPER, do hereby certify that I am
duly appointed and qualified to act as Official Court Reporter
for the United States District Court for the District of
Arizona.

I FURTHER CERTIFY that the foregoing pages constitute
a full, true, and accurate transcript of all of that portion of
the proceedings contained herein, had in the above-entitled
cause on the date specified therein, and that said transcript
was prepared under my direction and control, and to the best of
my ability.

DATED at Phoenix, Arizona, this 26th day of June,
2019.

s/Elaine M. Cropper

Elaine M. Cropper, RDR, CRR, CCP

United States District Court